# UNITED STATES REPORTS

## VOLUME 547

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CASES ADJUDGED

IN

# THE SUPREME COURT

AT

OCTOBER TERM, 2005

FEBRUARY 28 THROUGH JUNE 20, 2006

FRANK D. WAGNER

REPORTER OF DECISIONS

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# ERRATA

513 U. S. 1157, No. 94–6610: "639 A. 2d" should be "639 N. E. 2d".
546 U. S. 911, No. 05–5623: "138 Fed. Appx." should be "132 Fed. Appx.".
546 U. S. 1004, No. 05–436: "283 Wis. 2d" should be "288 Wis. 2d".

# JUSTICES

OF THE

## SUPREME COURT

DURING THE TIME OF THESE REPORTS

JOHN G. ROBERTS, Jr., Chief Justice.
JOHN PAUL STEVENS, Associate Justice.
ANTONIN SCALIA, Associate Justice.
ANTHONY M. KENNEDY, Associate Justice.
DAVID H. SOUTER, Associate Justice.
CLARENCE THOMAS, Associate Justice.
RUTH BADER GINSBURG, Associate Justice.
STEPHEN BREYER, Associate Justice.
SAMUEL A. ALITO, Jr., Associate Justice.

RETIRED

SANDRA DAY O'CONNOR, Associate Justice.*

OFFICERS OF THE COURT

ALBERTO R. GONZALES, Attorney General.
PAUL D. CLEMENT, Solicitor General.
WILLIAM K. SUTER, Clerk.
FRANK D. WAGNER, Reporter of Decisions.
PAMELA TALKIN, Marshal.
JUDITH A. GASKELL, Librarian.

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*Justice O'Connor retired on January 31, 2006. See *post*, p. v.

# SUPREME COURT OF THE UNITED STATES

## ALLOTMENT OF JUSTICES

*It is ordered* that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective February 1, 2006, viz.:

For the District of Columbia Circuit, JOHN G. ROBERTS, JR., Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, JOHN G. ROBERTS, JR., Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, SAMUEL A. ALITO, JR., Associate Justice.

For the Ninth Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Tenth Circuit, STEPHEN BREYER, Associate Justice.

For the Eleventh Circuit, CLARENCE THOMAS, Associate Justice.

For the Federal Circuit, JOHN G. ROBERTS, JR., Chief Justice.

February 1, 2006.

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(For next previous allotment, see 546 U. S., p. VI.)

# RETIREMENT OF JUSTICE O'CONNOR

## SUPREME COURT OF THE UNITED STATES

MONDAY, MARCH 27, 2006

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Present: CHIEF JUSTICE ROBERTS, JUSTICE STEVENS, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, JUSTICE THOMAS, JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE ALITO.

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THE CHIEF JUSTICE said:

Before calling the first case, I would like to acknowledge the presence in the Courtroom this morning of Justice Sandra Day O'Connor, and I would like to read into the records of the Court an exchange of correspondence. The first letter is dated January 31, 2006, the effective date of Justice O'Connor's retirement. It is to her from me and it reads as follows:

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF THE CHIEF JUSTICE,
*Washington, D. C., January 31, 2006.*

Dear Sandra:

I am honored to transmit to you the letter that the members of the Court with whom you sat for so many years signed shortly after you announced your retirement last summer. After serving with you for only a few months, I understand how sincere and heartfelt their sentiments are. I join them wholeheartedly, with added appreciation for your invaluable guidance and support over the past several months.

Sincerely,
JOHN

THE CHIEF JUSTICE said:

I would like now to invite JUSTICE STEVENS to read the letter that was signed last summer.

JUSTICE STEVENS said:

This letter is dated July 18, 2005, and it was written by William H. Rehnquist, and signed by all of Justice O'Connor's then colleagues.

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF THE CHIEF JUSTICE,
*Washington, D. C., July 18, 2005.*

Dear Sandra:

Your decision to retire brings a sense of loss to each of us. When you came to the Court twenty-four years ago, you faced the same challenges that new members of the institution have always faced. But in addition you faced a challenge that none of them had faced—you were the first woman justice. You have met all of these challenges with ability and élan.

Your opinions have left their mark on every major field of the Court's jurisprudence. You have also lent your hand to numerous extra-judicial activities—the ABA's CEELI, for example, and the Court's Renovation Committee. We have all profited from your contributions during our twelve years together, and will miss you greatly.

Affectionately,
WILLIAM H. REHNQUIST
JOHN PAUL STEVENS
ANTONIN SCALIA
ANTHONY M. KENNEDY
DAVID H. SOUTER
CLARENCE THOMAS
RUTH BADER GINSBURG
STEPHEN BREYER

THE CHIEF JUSTICE said:

The final letter is dated today, March 27th, and it reads:

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF JUSTICE SANDRA DAY O'CONNOR *(Retired)*,
*Washington, D. C., March 27, 2006.*

Dear Colleagues,

Thank you for the kind letter each of you signed on the occasion of my retirement.

I look back on my twenty-four plus years here with warm appreciation for all the goodwill each of you has shown to me despite the occasionally contentious nature of our work. I can truly say our nation is blessed by having a Supreme Court with such gifted, intelligent, and hardworking members. The process followed here works remarkably well.

I will always cherish the opportunity to have served on the Court with each of you.

Sincerely,
Sandra

# PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF CHIEF JUSTICE REHNQUIST*

THURSDAY, JUNE 15, 2006

Present: CHIEF JUSTICE ROBERTS, JUSTICE STEVENS, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, JUSTICE THOMAS, JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE ALITO.

THE CHIEF JUSTICE said:

The Court is in special session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to Chief Justice William H. Rehnquist.

The Court recognizes the Solicitor General.

Mr. Solicitor General Clement addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

At a meeting today of the Bar of this Court, Resolutions memorializing our deep respect and affection for Chief Justice Rehnquist were unanimously adopted.

## RESOLUTION

Today, the members of the Bar of the Supreme Court honor the life and legacy of a gifted lawyer, a selfless public servant, and a treasured teacher, mentor, and friend. Those who knew William Rehnquist will remember him as one who, in the words of Justice Oliver Wendell Holmes, "lived greatly in the law." To his credit, however, Bill Rehnquist cared less about being "great" than about doing and living well. As President George W. Bush remarked on the occasion of his funeral, "to work beside William Rehnquist was to learn how a wise man looks at the law and how a good man looks at life."

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*Chief Justice Rehnquist died in Arlington, Virginia, on September 3, 2005 (545 U. S., p. XI).

Rehnquist was born in Wisconsin, on October 1, 1924, the son of a paper salesman and a homemaker who also worked as a translator. Christened William Donald Rehnquist at birth, the future Chief Justice changed his middle name to Hubbs—a family name—in high school. His mother, Rehnquist later explained, had once met a numerologist on a train, and Mrs. Rehnquist was advised that her son would enjoy great success in life if his middle name were changed to begin with the letter "H."

Rehnquist was raised in Shorewood, a Milwaukee suburb on Lake Michigan. Early on, he displayed his love of the friendly wager, betting his sister on a Memorial Day weekend that he could dive into the lake more often than she. He won, and contracted pneumonia in the bargain. Rehnquist graduated from high school in 1942, and after a term at Kenyon College, he joined the United States Army Air Corps. Consistent with his lifelong interest in the weather—a fascination that would be the stuff of many jokes and memories among his friends and law clerks—he signed up for a premeteorology program. He was reassigned to work as a weather observer when, as he later put it, "the brass realized that someone had mistakenly added a zero to the number of weather forecasters that would be needed." His wartime service took him not only to Oklahoma, New Mexico, Texas, New Jersey, and Illinois, but also to more exotic destinations such as Casablanca, Marrakesh, Tripoli, and Cairo.

Rehnquist's assignment in North Africa impressed upon him that "if you lived in the right place, you didn't have to shovel snow for four months a year."[1] Accordingly, after discharging from the service as a sergeant, he headed west, and matriculated as an undergraduate at Stanford University in 1946. There, he supplemented the financial assistance he received through the G. I. Bill with odd jobs, including working as a "hasher" in the dormitory of his future colleague, Sandra Day.

After graduation, Rehnquist thought he wanted to become a professor of political science, so he studied government for a year at Harvard and earned his master's degree. But he later decided against continuing his graduate work, and instead took a standardized occupational examination, the results of which suggested that he might thrive as a lawyer. He then returned to the west, and to Stanford's law school, where he flourished. As he recalled, some 50 years later, in his typically understated manner, "the law curriculum came more easily to me than it did to some others."[2] His friend and classmate, the future Justice O'Connor, was more definitive: "[H]e quickly rose to the top of the class and, frankly, was head and shoulders above all the rest of us in terms of sheer legal talent and ability."[3]

One of Rehnquist's professors had been a law clerk for Justice Robert Jackson, and thought highly enough of Rehnquist to recommend him to Jackson as a prospective clerk. When Jackson hired the young lawyer, the position was Rehnquist's first "honest-to-goodness job as a graduate lawyer"[4] and, more significantly, his first exposure to the institution to which he would dedicate 33 years of his professional life.

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[1] William H. Rehnquist, Seen in a Glass Darkly: The Future of the Federal Courts, 1993 Wis. L. Rev. 1, 1 (1993).

[2] Michael Eagan, One-on-One with the Chief, Stanford Lawyer, Spring 2005, p. 27.

[3] Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Senate Committee on the Judiciary, 92d Cong., 1st Sess., 12 (1971) (statement of Sen. Paul J. Fannin) (quoting State Sen. Sandra D. O'Connor).

[4] William H. Rehnquist, The Supreme Court: How It Was, How It Is 19 (1987).

Rehnquist later described his clerkship during the 1951 and 1952 Terms as "one of the most rewarding experiences of my life."[5] His time in Washington proved doubly rewarding, for during this period he began dating Natalie "Nan" Cornell, a San Diegan he had met at Stanford. They started with "Thursday night" dates, until Nan was convinced that she liked the young lawyer enough to move on to Saturdays.

After the clerkship, Rehnquist kept in his study a photograph of his boss, inscribed "To William Rehnquist, with the friendship and esteem of Robert H. Jackson." Later, as a member of the Court, Rehnquist would make the same inscription for his law clerks, recounting Jackson's remark, "You may not be impressed, but it might impress your clients." Perhaps most telling, the personal attributes that the young William Rehnquist admired most in Justice Jackson include many of the same qualities his own law clerks remember and appreciate about him: "[H]is own ego or view of his own capacities was never unduly elevated by any of the successes which he achieved"; he "never succumbed to [the] temptation," so common in Washington, to "become . . . isolated in high public office"; and "[h]e did not have to read the view of some particular columnist, commentator, or editorial writer in order to know what he thought about a particular factual situation."[6]

Characteristically unconventional, Rehnquist passed up opportunities at lucrative East Coast law firms. He thought California too big and too populated, and decided to look for a home in the southwestern United States, hoping to find the American equivalent of the North African climate he so enjoyed. Rehnquist married his beloved Nan in August 1953, and the couple ultimately settled on Phoenix. He later told his law clerks that the descent into Phoenix, without air conditioning, in his 1941 Studebaker, was like "driving into Hell."

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[5] Remarks of the Chief Justice, Dedication of the Robert H. Jackson Center, Jamestown, New York (May 16, 2003).

[6] William H. Rehnquist, Robert H. Jackson: A Perspective Twenty-Five Years Later, 44 Alb. L. Rev. 533, 539 (1980).

He was the ninth lawyer at one of the "large" law firms in Phoenix, and he was paid $300 per month. Two years later, hoping for more courtroom experience, he opened a two-lawyer office, and for a time, Rehnquist took whatever clients came in the door. He volunteered to represent indigent criminal defendants in federal court, but suffered a series of defeats, leading a federal prosecutor to joke that a cell block at Leavenworth had been named after Rehnquist. He delighted in telling stories of his practice before eccentric jurists in Arizona's remote "cow counties." A favorite involved the representation of state legislators in a lawsuit adverse to the State's attorney general, during which Rehnquist made pointed reference to an inconsistency between his adversary's litigating position and previous public statements. Summoned to the judge's chambers after oral argument, young Rehnquist remembered that his "heart almost stopped" as he prepared himself for a trip to the woodshed, only to hear the jurist from Cochise County remark: "I was sure glad to see you tee off on the Attorney General in your argument on that last motion. He's a worthless son-of-a-bitch, and the sooner this state gets rid of him the better off we'll all be."

During his 16 years of private practice, Rehnquist represented a broad array of clients and handled a wide range of litigation matters. He was also active in politics, providing legal advice and draft speeches for the 1964 Goldwater presidential campaign. He wrote op-ed pieces and bar journal articles, spoke before bar and civic groups, served as President of the Maricopa County Bar Association, and was a favorite at continuing legal education seminars. He spent four years as the town attorney for Paradise Valley, was special counsel to the Arizona Department of Welfare, served as Special Assistant Attorney General for the Arizona Highway Department, and represented the State Bar of Arizona in attorney disciplinary matters. In 1971, the Board of Governors of the State Bar of Arizona praised Rehnquist for having "continually demonstrated the very highest degree of professional competence and integrity and devotion to the ends of justice."[7]

Through it all, Rehnquist maintained a balanced life. He would work typically from 8:30 a.m. to 5:00 p.m., then close the law books, and go home for a family dinner. He and Nan were blessed with three children, Jim, Janet, and Nancy. Even when Rehnquist was in trial, the family dinner was sacred, and he would either bring work home or make the 10-minute drive back to the office after dinner. Keeping a schedule that was unusual then, and virtually unheard of today, for the family of a top litigator, the Rehnquists managed to take a month's vacation every year. Rehnquist especially loved camping vacations across the West, visits to a small cabin in the Bradshaw Mountains of Arizona, and driving fast on country roads, telling his children that a double yellow line was "just a recommendation." The Rehnquists also maintained an active family-oriented social life, including bridge, charades, cookouts, and hikes. Later in life, Rehnquist reminisced that he "had the good fortune to realize long ago, instinctively, what I now see very clearly—and that is that time is a wasting asset." Rehnquist spent abundant time with his wife and young children, "not out of any great sense of duty, but just because I enjoyed it so much."

After the 1968 presidential election, Rehnquist's involvement in politics resulted in an opportunity to serve as Assistant Attorney General for the Office of Legal Counsel in the United States Department of Justice. Upon receiving word of this job offer, Rehnquist visited the Phoenix public library to see what he could learn about the office, and he was sufficiently intrigued by what he read to accept the position. The family moved to Washington, but Rehnquist never lost his deep affection for Arizona or his fond memories of these earlier years. He left Phoenix, as he put it, "very much richer for the experience, but having accumulated very little of the world's goods."

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[7] Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Senate Committee on the Judiciary, 92d Cong., 1st Sess., 7 (1971) (Resolution of the Board of Governors of the State Bar of Arizona).

As Assistant Attorney General, Rehnquist was "in effect, the President's lawyer's lawyer,"[8] as President Richard Nixon would later say. Rehnquist served in the Justice Department during challenging years in the midst of the Vietnam War. He helped to hone the position of the Executive Branch on delicate legal issues and carried the message of the Administration around the country in numerous public appearances. He discharged his responsibilities with such great distinction that President Nixon would declare, "among the thousands of able lawyers who serve in the Federal Government, he rates at the very top as a constitutional lawyer and as a legal scholar." When Justice John Marshall Harlan II retired in 1971, Rehnquist was the President's choice to be the 100th Justice of the Supreme Court.

Confirmed in 1972 at age 47, Rehnquist was one of the youngest Justices of the Supreme Court in modern history. Yet his views on important matters of constitutional law were remarkably well formed. Rehnquist once wrote that "[p]roof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias,"[9] and Rehnquist's mind certainly was no blank slate.

In 1976, he summed up his judicial philosophy in an essay entitled, "The Notion of a Living Constitution."[10] He rejected the notion that judges "are a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country." That elected representatives had not solved a particular social problem, he wrote, did not necessarily authorize the federal judiciary to act: "Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal Judiciary may press a buzzer and take its turn at fashioning a solution." Rehnquist was critical of a mode of constitutional interpretation that would allow "appointed federal judges" to impose on others a rule that "the popularly elected branches of government would not have enacted and the voters have not and would not have embodied in the Constitution." This approach, he warned, was a "formula for an end run around popular government," and "genuinely corrosive of the fundamental values of our democratic society."

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[8] President Richard Nixon, Address to the Nation Announcing Intention to Nominate Lewis F. Powell, Jr., and William H. Rehnquist to be Associate Justices of the Supreme Court of the United States (Oct. 21, 1971), in Public Papers of the Presidents of the United States: Richard Nixon, p. 1056 (1972).

[9] *Laird* v. *Tatum*, 409 U. S. 824, 835 (1972) (Rehnquist, J., in chambers).

[10] William H. Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693 (1976).

As an Associate Justice, Rehnquist emerged as a powerful intellectual force. He authored a number of significant opinions for the Court, but also did not hesitate to express his position in solitary dissent,[11] thus inspiring an early group of law clerks to bestow upon him a Lone Ranger doll as a mantlepiece.[12] When Chief Justice Warren Burger resigned in 1986, it was precisely Rehnquist's powerful intellect, his stellar record on the Court, and his consistent judicial philosophy that made him President Ronald Reagan's pick to lead the Court. But no less important were Rehnquist's leadership qualities and the respect he garnered from all of his colleagues, owing to his pleasant and down-to-earth nature, quiet confidence, quick wit, and basic fairness.

On June 17, 1986, the President announced his nomination of Justice Rehnquist to become the sixteenth Chief Justice of the United States. During the ensuing confirmation hearings, numerous witnesses testified glowingly to Rehnquist's distinguished service on the Court and his high-powered legal mind. Former Solicitor General Rex Lee, for instance, stated: "Of all the lawyers with whom I am acquainted, I know of literally no one who is better qualified to be Chief Justice of the United States." A representative of the American Bar Association reported the "genuine enthusiasm" felt by other Justices and Court employees about Rehnquist's nomination to be Chief Justice: "There was almost a unanimous feeling of joy . . . . [H]e is regarded as a close personal friend of men who are diametrically opposed to him philosophically and politically."[13]

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[11] See, *e. g., Allenberg Cotton Co.* v. *Pittman*, 419 U. S. 20, 34 (1974) (Rehnquist, J., dissenting); *Jimenez* v. *Weinberger*, 417 U. S. 628, 638 (1974) (Rehnquist, J., dissenting); *Baker* v. *Gold Seal Liquors, Inc.*, 417 U. S. 467, 478 (1974) (Rehnquist, J., dissenting); *Sugarman* v. *Dougall*, 413 U. S. 634, 649 (1973) (Rehnquist, J., dissenting); *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U. S. 619, 621 (1973) (Rehnquist, J., dissenting).

[12] John M. Nannes, The "Lone Dissenter", 31 J. Sup. Ct. Hist. 1 (2006).

As Rehnquist took his new seat as the leader of the Court in 1986, President Reagan presciently remarked that he "will be a Chief Justice of historic stature."[14] Rehnquist served as Chief Justice for nearly 20 years, and together with his service as an Associate Justice for more than 14 years, this tenure made him one of the Supreme Court's seven longest-serving members. In that time, Rehnquist left an indelible mark on the Supreme Court, on the functioning of the federal Judiciary, and on the face of American law.

Rehnquist's jurisprudential legacy cuts a broad swath, but it is undoubtedly substantial in the areas of criminal procedure and the constitutional rights of criminal defendants. Rehnquist was appointed to the Court shortly after a series of decisions by the Warren Court had expanded the constitutional rights of the accused in criminal cases, and his early opinions made clear that he believed the pendulum had swung too far in that direction. Dissenting from the denial of a stay in *California* v. *Minjares,*[15] he called for reevaluation of the "exclusionary rule" applied to the States in *Mapp* v. *Ohio* in 1961. Complaining that evidence was suppressed "solely because of a good-faith error in judgment" on the part of arresting officers, Rehnquist disputed that the exclusionary rule was necessary to preserve the "integrity" of the courts: "[W]hile it is quite true that courts are not to be participants in 'dirty business,' neither are they to be ethereal vestal virgins of another world, so determined to be like Caesar's wife, Calpurnia, that they cease to be effective forums in which both those charged with committing criminal acts and the society which makes the charge may have a fair trial in which relevant competent evidence is received in order to determine whether or not the charge is true." In another early opinion, explaining the controversial 1966 decision in *Miranda* v. *Arizona,* Rehnquist wrote for the Court in *Michigan* v. *Tucker* that the procedural safeguards recommended by *Miranda* "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." [16]

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[13] Nomination of Justice William Hubbs Rehnquist: Hearings Before the Senate Committee on the Judiciary, 99th Cong., 2d Sess., 108 (1986) (statement of John D. Lane, American Bar Association's Standing Committee on Federal Judiciary).

[14] President Ronald Reagan, Remarks at the Swearing-in Ceremony for William Rehnquist as Chief Justice and Antonin Scalia as Associate Justice (Sept. 26, 1986), in The Supreme Court of the United States: Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee, 1916–1986, pp. 1272, 1273 (Roy M. Mersky & J. Myron Jacobstein eds., 1989).

Neither *Mapp* nor *Miranda* was overruled during Rehnquist's long tenure on the Court. Indeed, in *Dickerson* v. *United States,* the Chief Justice wrote for the Court in 2000 that "[w]hether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now." [17] Yet the pendulum surely swung back, with the Court affording the States more latitude in developing procedures for the prosecution of criminal cases, recognizing the practical needs of the police in investigating crime, and fashioning clearer rules for law enforcement officials and citizens alike. The exclusionary rule remains in effect, but the suppression of evidence seized in "good faith," decried by Rehnquist in his *Minjares* dissent, is far less common in light of the good-faith exception to the exclusionary rule adopted during Rehnquist's tenure.[18] *Miranda* remains a "constitutional decision," but exceptions and limitations adopted by the Court ensure that it gives way to competing concerns such as the protection of public safety[19] and the strong interest in making available to the trier of fact all relevant and trustworthy evidence.[20] Testifying in support of Rehnquist's appointment as Chief Justice, former Attorney General Griffin Bell aptly observed that Justice Rehnquist had joined in making the right to counsel, *Miranda* rights, and the exclusionary rule "more workable," and cited the good-faith exception as "a good example of saving the exclusionary rule from its own excesses."

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[15] *California* v. *Minjares,* 443 U. S. 916 (1979) (Rehnquist, J., dissenting from denial of stay).

[16] *Michigan* v. *Tucker,* 417 U. S. 433, 444 (1974).

[17] *Dickerson* v. *United States,* 530 U. S. 428, 443 (2000).

Another area where Rehnquist's work had a powerful effect on the shape and development of the law is religious freedom and church-state relations. In First Amendment cases, Rehnquist consistently endorsed the idea that governments *may*, consistent with the Constitution, do quite a bit to accommodate and acknowledge religion, but are not *required* by the Constitution to provide religious believers with special exemptions from generally applicable laws. It is not an "establishment" of religion, he maintained, for politically accountable actors to act in ways that benefit religious believers and institutions or to recognize religious traditions and teachings.[21] That *governments* may not "establis[h]" religion does not mean, he believed, that religion has no place in public life or civil society. At the same time, he insisted, it is rarely a violation of the free-exercise guarantee for those same actors to apply to religious people and religiously motivated conduct the same rules that apply generally.[22]

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[18] *United States* v. *Leon*, 468 U. S. 897 (1984).

[19] *New York* v. *Quarles*, 467 U. S. 649 (1984).

[20] *Michigan* v. *Tucker*, 417 U. S., at 450.

[21] *Zelman* v. *Simmons-Harris*, 536 U. S. 639 (2002); *Mueller* v. *Allen*, 463 U. S. 388 (1983).

As it turned out, Rehnquist's last opinion was for a plurality in *Van Orden* v. *Perry,* in which the Justices ruled that Texas had not "establish[ed]" religion by including a Ten Commandments monument among the nearly 40 monuments and historical markers on the grounds surrounding the State Capitol. He wrote:

> "Our cases, Januslike, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation's history. . . . The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom.
>
> "This case, like all Establishment Clause challenges, presents us with the difficulty of respecting both faces. Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a separation between church and state. Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage[.]"[23]

In this last opinion, Rehnquist returned to themes that he had developed at length in one of his most famous opinions, a dissent in *Wallace* v. *Jaffree.*[24]

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[22] *Goldman* v. *Weinberger,* 475 U. S. 503 (1986); *Thomas* v. *Review Bd. of Indiana Employment Security Div.,* 450 U. S. 707, 720 (1981) (Rehnquist, J., dissenting); see also *Employment Div., Dept. of Human Resources of Ore.* v. *Smith,* 494 U. S. 872 (1990).

[23] *Van Orden* v. *Perry,* 545 U. S. 677, 683–684 (2005) (plurality opinion).

[24] *Wallace* v. *Jaffree,* 472 U. S. 38, 91 (1985) (Rehnquist, J., dissenting).

A third area where Rehnquist's legacy is both striking and significant involves the structure and powers of the federal government created by our Constitution and the role and retained powers of the States. From his earliest to his final days on the Court, Rehnquist was committed to what he called "first principles":[25] Ours is a national government of limited, delegated, and divided powers, and the government's structure, no less than the Bill of Rights, is a safeguard for individual liberty. Rehnquist's dedication to these principles, and to enforcing the limits and boundaries that our Constitution imposes on federal power, reflected his understanding that our constitutional design leaves ample room for diverse policy experiments and different answers to pressing social questions.

Rehnquist's commitment to judicial enforcement of enumerated powers and the federal-state balance was perhaps most discernable in the Court's cases interpreting the Commerce Clause. As early as 1975, dissenting alone, Rehnquist argued that the federal government must treat the States like sovereign entities, rather than like individuals. Even when Congress has authority under the federal commerce power to regulate private conduct in a particular area, it could not apply that regulation to the States if doing so would interfere with what he called "traditional state functions."[26]

As happened a number of times during his tenure, Rehnquist's position in dissent ultimately was embraced by a majority of his colleagues. In *National League of Cities* v. *Usery,* a majority of the Court adopted his "traditional governmental functions" test.[27] Although the Court ultimately overruled *National League of Cities* nine years later, Rehnquist, in a pithy reply, thought it not "incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."[28] And true to his prediction, Rehnquist's promotion of federalism forged ahead, serving as the basis for the Court's declaration of an anticommandeering principle,[29] its strengthening of the States' sovereign immunity,[30] and its reaffirmation of the existence of "judicially enforceable outer limits" on the commerce power itself, in *United States* v. *Lopez* in 1995.[31]

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[25] *United States* v. *Lopez,* 514 U. S. 549, 553 (1995).

[26] *Fry* v. *United States,* 421 U. S. 542, 558 (1975) (Rehnquist, J., dissenting).

[27] *National League of Cities* v. *Usery,* 426 U. S. 833, 852 (1976).

Rehnquist's dedication to judicial restraint and popular government is perhaps most evident in his writings on the subject of "substantive due process." At his death, Rehnquist was the last remaining member of the Court that had decided *Roe* v. *Wade*. He had dissented from the opinion of the Court, comparing the majority's reasoning to the discredited doctrine of *Lochner* v. *New York*,[32] and commenting that the Court's opinion in *Roe* "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment."[33] While Rehnquist garnered only four votes for his later view that *Roe* should be overruled, the Court ultimately did adopt his restrained approach to substantive due process. In *Washington* v. *Glucksberg*,[34] Chief Justice Rehnquist wrote for the majority and recognized that "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." The Court declared that it would "exercise the utmost care" whenever asked to "break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." Thus, Rehnquist's opinion was consistent with the view articulated more than 20 years earlier, in his essay on the "living Constitution," that judicial review under the Fourteenth Amendment should not be employed as an "end run around popular government," in a way that is "genuinely corrosive of the fundamental values of our democratic society." Running through his opinions on any number of questions—from assisted suicide and abortion to Christmas displays, campaign finance, and the death penalty—is a deep commitment to the idea that our Constitution leaves important, difficult, and even divisive decisions to the people.

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[28] *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 580 (1985) (Rehnquist, J., dissenting).

[29] *New York* v. *United States*, 505 U. S. 144 (1992).

[30] *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996).

[31] *United States* v. *Lopez*, 514 U. S., at 565.

[32] *Lochner* v. *New York*, 198 U. S. 45 (1905).

[33] *Roe* v. *Wade*, 410 U. S. 113, 174 (1973) (Rehnquist, J., dissenting).

[34] *Washington* v. *Glucksberg*, 521 U. S. 702 (1997).

Rehnquist's legacy on the Supreme Court involves much more than doctrinal contributions and particularly noteworthy decisions. He encouraged and exemplified collegiality, fairness, and graciousness among the Justices, urging them towards greater consensus where possible, and thereby enhancing the respect enjoyed by the Court in American society. To some degree, Rehnquist's achievements as the leader of the Court were the result of a subtle transformation in Rehnquist himself—from Justice Rehnquist, "The Lone Dissenter," to Chief Justice Rehnquist, the consensus-builder.

In his 1986 confirmation hearings, Rehnquist alluded to the role of a Chief Justice in gaining consensus, and allowed that deviation from his personal judicial philosophy may be proper "where there are constraints that there ought to be a court opinion rather than a plurality opinion."[35] Rehnquist later acknowledged, in a 2001 interview, that while his legal philosophy had never changed, since becoming the Chief Justice he had "become a lot more convinced of the need for the Court to get a Court opinion in each case. . . . I'm more conscious of the need for that and also conscious of the . . . lack of need for a lot of concurring opinions."[36]

For those attorneys privileged to argue before the Supreme Court during Rehnquist's long tenure, his legacy is probably as much about his commanding presence on the Bench as his approach to the Constitution or the Conference. Rehnquist's view of oral argument was emblematic of his no-nonsense approach to judging and life. He wrote that oral argument "forces the judges who are going to decide the case and the lawyers who represent the clients whose fates will be affected by the outcome of the decision to look at one another for an hour, and talk back and forth about how the case should be decided."

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[35] Nomination of Justice William Hubbs Rehnquist: Hearings Before the Senate Committee on the Judiciary, 99th Cong., 2d Sess., 209 (1986).

[36] Interview by Charlie Rose with William H. Rehnquist, Washington, D. C., in *The Charlie Rose Show* (PBS television broadcast, Feb. 16, 2001).

Rehnquist preferred plain-spoken arguments to flowery rhetoric or pretense. Although he was a kind and easygoing man, he adopted a stern and no-nonsense demeanor on the Bench, running arguments with Nordic precision. The moment the red light came on, the Chief thanked counsel for the presentation, even if the lawyer was in mid-sentence, and then called the next lawyer or case. When one lawyer rose to present his rebuttal, the Chief ended the argument by stating, while breaking a wry smile, "the Marshal says you have 5 seconds left, and under the principle of *de minimis non curat lex,* the case is submitted."

Rehnquist's dry sense of humor often was on display during argument sessions. During one argument, a lawyer gave what he described as an "honest and principled answer" to another Justice's question, and the Chief quickly replied, "we hope all your answers will be principled." When a lawyer responded to Rehnquist's recitation of a case by saying "you are correct, Chief Justice," the Chief said, "I'm glad to know that." During his last public session on the Bench, Rehnquist observed that seven different opinions had been written in a case, then remarked, "I didn't know we had so many Justices."

As the Chief Justice, Rehnquist presided over not only the Bench and the Conference, but over the entire Judicial Branch as well. He brought to this role the same collegiality, wisdom, effectiveness, and clarity of purpose that marked his leadership of the Supreme Court itself. As with so many things he did, he impressed all with his ability to perform so effortlessly the myriad tasks of running the Judiciary. His colleague Justice Byron White remarked in 1996 that "of the three Chief Justices with whom I have served, the man who now sits in the center chair . . . seems to me to be the least stressed by his responsibilities and to be the most efficient manager of his complicated schedule."[37] Rehnquist, he said, "reminds me of a highly conditioned cross between a quarter horse and racing thoroughbred."

Rehnquist brought his penchant for innovation and efficiency to management of the Judicial Branch. He adopted changes that dramatically improved the efficiency and operation of the Judicial Conference, including what he termed a "notably strengthened Executive Committee," which became the senior executive arm of the Judicial Conference.[38] He fostered inclusiveness by requiring, for the first time, that members of Judicial Conference committees rotate regularly, and he never asserted his authority as Chief Justice to govern with a heavy hand. A vigorous defender of the Third Branch, Rehnquist effectively used the pulpit provided by his position to support and defend the Judiciary and to improve inter-branch relations. He wisely understood that Congress had an important role to play in overseeing the Judiciary, and he communicated often with congressional leaders, in both formal and less formal settings, to advance the goals of the Judiciary. As he put it, "Judges . . . have no monopoly of wisdom on matters affecting the Judiciary. . . . Legislators and executive officials, no less than judges, are committed to an effective Judiciary."[39]

But Rehnquist also understood full well the importance of an independent and vibrant Judiciary, and he staunchly defended the Judiciary from attacks, often resorting—as he did in other areas—to lessons from history. In 2004, he addressed congressional suggestions for impeachment of federal judges who issue unpopular decisions by explaining that "our Constitution has struck a balance between judicial independence and accountability, giving individual judges secure tenure but making the federal Judiciary subject ultimately to the popular will because judges are appointed and confirmed by elected officials."[40] His leadership engendered great loyalty from the members of the federal Judiciary, and in the end, one judge captured the sentiment of a great many, saying that Chief Justice Rehnquist "was our wise leader, our strongest supporter and our true friend."

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[37] Byron R. White, Introduction to William H. Rehnquist, 6 The Gauer Distinguished Lecture In Law and Public Policy: Civil Liberty and the Civil War 3, 3–5 (1997).

[38] William H. Rehnquist, Holiday Message, Third Branch 8 (Dec. 1987).

[39] William H. Rehnquist, 1992 Year-End Report on the Federal Judiciary 2.

Above and beyond his demanding official duties, Rehnquist pursued and cultivated a rich array of interests and passions. Family, friends, and law clerks remember well his dedication to afternoon swims and weekly tennis matches, his friendly wagering on football, horse races, or even the amount of snowfall, his love for trivia and charades, and his interest and voluminous knowledge of literature, geography, history, and art. Rehnquist also served as Historian-in-Chief, writing books on the history of the Supreme Court, the impeachment trials of Chase and Johnson, the controversial Hayes-Tilden presidential election of 1876, and civil liberties in wartime. Remarkably, Rehnquist himself became the second Chief Justice in history to preside over an impeachment trial, confronted a disputed presidential election in 2000, and led the Court as it decided pressing questions involving civil liberties and security in the context of the war on terror and the attacks of September 11, 2001.

For those who knew, worked with, learned from, and cared about William Rehnquist, his personal qualities—the unassuming manner, the care he took to put people at ease, and his evident desire to serve as a teacher and mentor—are as salient in memories of him as his re-invigoration of the "first principles" of our federalism, his re-focusing of the Fourth Amendment on reasonableness, or his conviction that the religion clauses of the First Amendment do not require a public square scrubbed clean of religious faith and expression. Rehnquist never forgot what it felt like to arrive at the Court as a slightly awestruck and appropriately apprehensive law clerk. He never lost his sense of gratitude for the opportunity to learn and serve the law in that great institution. And he never outgrew or got tired of teaching young lawyers how to read carefully, write clearly, think hard, and live well.

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[40] William H. Rehnquist, 2004 Year-End Report on the Federal Judiciary 4.

William Rehnquist served well his country, his profession, and the Constitution. All the while, he kept and nurtured a healthy focus on real things and places, and he embraced the value, interest, and importance of ordinary, everyday life. We are reminded of how the Chief had taken to heart Dr. Johnson's dictum that "[t]o be happy at home is the end of all human endeavor." In a 2000 commencement address, he invoked the wonderful old Jimmy Stewart movie, *You Can't Take it With You,* to urge the assembled, ambitious young lawyers to "[d]evelop a capacity to enjoy pastimes and occupations that many can enjoy simultaneously—love for another, being a good parent to a child, service to your community."[41] He instilled in so many of his friends, colleagues, and law clerks a commitment to building and living an *integrated* life as a lawyer, a life that is not compartmentalized, atomized, or segregated but that pulls and holds together work, friends, family, faith, and community. Rehnquist understood that the need for such a commitment is particularly acute among lawyers, and he worried that the profession he so thoroughly enjoyed and in which he thrived had become marked, for many, by brutally long hours of well-paid stress and drudgery.

In the final years of his life, he recalled happily that the "structure of the law practice" in Phoenix when he practiced there "was such that I was able to earn a decent living, while still finding time for my wife and children and some civic activities. Lawyers were not nearly as time conscious then as they are now; this meant that they probably earned less money than they might have, but had a more enjoyable life." He exhorted law school graduates to realize that because of their abilities and opportunities, they would have "choices," and that "how wisely you make these choices will determine how well spent you think your life is when you look back at it." Gathered here together, looking back at his life, the Members of the Bar of the Supreme Court are pleased and honored to announce the opinion that his was a great life, and well spent.

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[41] Chief Justice William H. Rehnquist, Commencement Address at George Washington University Law School (May 28, 2000).

Wherefore, it is accordingly

RESOLVED, that we, the Bar of the Supreme Court of the United States, express our great admiration and respect for Chief Justice William H. Rehnquist, our deep sense of loss upon his death, our appreciation for his contribution to the law, the Court, and the Nation, and our gratitude for his example of a life well spent; and it is further

RESOLVED that the Solicitor General be asked to present these resolutions to the Court and that the Attorney General be asked to move that they be inscribed on the Court's permanent records.

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THE CHIEF JUSTICE said:

Thank you General Clement. The Court recognizes the Deputy Attorney General of the United States.

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Deputy Attorney General McNulty addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

On behalf of the Attorney General, I am pleased to say that the Bar of the Court met today to honor the memory of William H. Rehnquist, Associate Justice of the Supreme Court from 1971 to 1986, and Chief Justice of the United States from 1986 to 2005.

William Rehnquist served his country with great honor and distinction. He was a patriot who deeply appreciated the virtues and foundations of our constitutional government. He had a giant intellect, but lacked all pretense and was known for his collegiality and sense of humor. And during his 33 years on this Court, he made a profound contribution to the American rule of law.

When he was only a child, William Rehnquist told his elementary school teacher that he was "going to change the government."[42] Not long thereafter, he embarked on a path of public service and accomplishment that would lead him to fulfill that prediction.

His journey of public service began when he joined the Army as a teenager to serve his country during World War II. He served as a law clerk to one of the legendary figures in American law, Justice Robert Jackson, and he later served as an Assistant Attorney General in the Nixon administration.

At the Department of Justice, it has been said that he converted what was then a little known post—the Office of Legal Counsel—into "'one of the key positions of the administration.'"[43] He also successfully argued a case before this Court, after which he remarked he "was drenched with sweat."[44]

But that was just a beginning. In 1971, Rehnquist only in his 40s, was appointed to this Court. He immediately became known for his fierce intellect, lone dissents, and conservative jurisprudence. He also impressed his new colleagues with his affable, down-to-earth Midwestern demeanor, if not his trademark sideburns and thick-rimmed glasses.

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[42] Clare Cushman, ed., The Supreme Court Justices, 1789–1995, p. 496 (2d ed. 1995).

[43] Warren Weaver, Jr., The Chief Justice in Eight Men and a Lady: Profiles of the Justices of the Supreme Court 31 (1990) (citing Professor Arthur S. Miller, George Washington University National Law Center).

[44] William H. Rehnquist, The Supreme Court 20 (2001). The case was *Ehlert* v. *United States*, 402 U. S. 99 (1971).

When Chief Justice Burger retired in 1986, President Reagan saw in Rehnquist the measure of a great Chief Justice. As President Reagan explained, Rehnquist had distinguished himself "for his intellectual power, the lucidity of his opinions, and the respect he enjoys among his colleagues."[45] When asked about his nomination to be Chief Justice, Rehnquist—flashing his characteristic wit and self-deprecation—replied, "I wouldn't call it the culmination of a dream, but it's not every day when you're 61 years old that you get a chance to have a new job."[46]

Chief Justice Rehnquist had a profound impact on the Court and our legal system. He authored close to 1,000 opinions,[47] presided over almost as many oral arguments, and administered the oath of office on five occasions to three different Presidents.[48] He was only the second Chief Justice to preside over impeachment proceedings against a sitting President.

He managed the Court with unrivaled efficiency. And he was uniformly praised by his colleagues for his fairness, impartiality, good humor, and selfless leadership on his watch.[49]

Chief Justice Rehnquist held the public decorum of the Court in the highest regard and had a powerful presence at the center of the Bench. He presided over perhaps the most active Bench in the history of this Court. As a result during oral argument, he often assumed the role of "master sergeant"—a role accented by the gold stripes that he wore on his robe in later years.

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[45] Weekly Compilation of Presidential Papers: Administration of Ronald Reagan 813 (1986).

[46] *Id.*, at 818.

[47] While Associate Justice, he authored 626 opinions, including 242 majority or plurality opinions, 297 dissents, 72 concurrences, and 15 opinions concurring in part and dissenting in part. While Chief Justice, he authored 340 opinions, including 219 majority or plurality opinions, 79 dissents, 24 concurring opinions, and 18 opinions concurring in part and dissenting in part.

[48] Chief Justice Rehnquist administered the oath of office to President George H. W. Bush on January 20, 1989, to President William J. Clinton on January 20, 1993, and January 20, 1997, and to President George W. Bush on January 20, 2001, and January 20, 2005.

[49] See Statements from the Supreme Court regarding the Death of Chief Justice William H. Rehnquist, September 4, 2005, available at http://www.supremecourtus.gov/publicinfo/press/pr09-04-05b.html.

He made virtually immeasurable contributions to American constitutional law. He was a key participant in the Court's decisions placing limits on the *Miranda* rule,[50] recognizing greater leeway for the police in conducting searches under the Fourth Amendment,[51] and in enforcing the limits of federal habeas corpus review of state court criminal convictions.[52]

His respect for the role of the States in our constitutional government sparked a revitalization of the doctrine of federalism. In 1975, Rehnquist wrote in dissent that "[s]urely there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments."[53] In time, his dissenting views on the role of federalism and the enumerated limits on federal legislative power secured a majority on the Court in a number of important cases, including the Court's landmark decision in *United States* v. *Lopez*.[54]

Chief Justice Rehnquist believed strongly in the virtues of judicial restraint. He cautioned that permitting "nonelected members of the federal judiciary" to resolve divisive social issues that were not addressed by the Constitution was "genuinely corrosive of the fundamental values of our democratic society."[55] He invoked such principles in his opinion for the Court in *Washington* v. *Glucksberg*[56] in which the Court refused to invoke the Due Process Clause as a means of invalidating a State's assisted-suicide ban.

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[50] See, *e. g.*, *New York* v. *Quarles*, 467 U. S. 649 (1984).

[51] See, *e. g.*, *Michigan* v. *Long*, 463 U. S. 1032 (1983); *United States* v. *Leon*, 468 U. S. 897 (1984); *California* v. *Ciraolo*, 476 U. S. 207 (1986); and *Florida* v. *Bostick*, 501 U. S. 429 (1991).

[52] See, *e. g.*, *Coleman* v. *Balkcom*, 451 U. S. 949 (1981); *Herrera* v. *Collins*, 506 U. S. 390 (1993); and *Felker* v. *Turpin*, 518 U. S. 651 (1996).

[53] *Fry* v. *United States*, 421 U. S. 542, 559 (1975) (Rehnquist, J., dissenting).

[54] 514 U. S. 549 (1995).

[55] William H. Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 694, 695, 706 (1976).

As an Associate Justice, Rehnquist wrote passionately in dissent that the Court's church-state jurisprudence had broken free from its constitutional and historical moorings.[57] As Chief Justice, he led the Court in a number of important Establishment Clause cases, including the Court's landmark decision of four Terms ago upholding Cleveland's student voucher program.[58]

Chief Justice Rehnquist was an ardent advocate on behalf of the federal judiciary and a champion of an independent judiciary. In his annual reports on the state of the federal judiciary, he addressed head-on and without pretense or partisanship the major issues confronting the judiciary each year. And in his 19th and final, year-end report, he wrote that it is "judicial independence that has made our judicial system a model for much of the world."[59]

Chief Justice Rehnquist was too modest to speak about his own place in history. But he once offered his own insights as to what made John Marshall such a great Chief Justice. He explained that Marshall "had a remarkable ability to reason from general principles"; "he was able to write clearly and cogently"; and, "every bit as important," he "was very well liked."[60]

William Rehnquist shared those same qualities with Marshall. He had a brilliant analytical mind and an encyclopedic knowledge of the law. As he proved in his legendary "Lone

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[56] 521 U. S. 702 (1997).

[57] See *Wallace* v. *Jaffree*, 472 U. S. 38, 91 (1985) (Rehnquist, J., dissenting); *Mueller* v. *Allen*, 463 U. S. 388 (1983).

[58] *Zelman* v. *Simmons-Harris*, 536 U. S. 639 (2002). See, *e. g.*, *Van Orden* v. *Perry*, 545 U. S. 677 (2005) (plurality); *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1 (1993).

[59] William H. Rehnquist, 2004 Year-End Report on the Federal Judiciary 8, January 1, 2005, available at http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf.

[60] William H. Rehnquist, Remarks of the Chief Justice, 52 Duke L. J. 787, 791 (2003).

Ranger" dissents, he was a powerful and lucid writer. And, "every bit as important," he was a beloved man who earned the trust, confidence, and deep admiration of his colleagues.

Chief Justice Rehnquist was a stalwart of the federal judiciary and a faithful guardian of our Constitution. Few Americans have contributed more to this Court or their country in the cause of justice and the rule of law. He deserves his place alongside the Nation's great Chief Justices. And the country owes him an enormous debt of gratitude for a life of devoted public service.

Mr. Chief Justice, on behalf of the Attorney General, the lawyers of this Nation, and in particular, the Bar of this Court, I respectfully request that the Resolutions presented to you in honor of the memory of Chief Justice William Rehnquist be accepted by the Court and that they, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

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THE CHIEF JUSTICE said:

Thank you, Mr. McNulty and General Clement, for your presentations.

Your motion that the Bar Resolutions be made part of the permanent record of the Court is granted. We also extend to Chairman Steve Colloton and members of the Committee on Resolutions, Chairman John Nannes, and members of the Arrangements Committee, and Ronald Tenpas, Chairman of today's meeting of the Bar, our appreciation for the Resolutions that you have adopted today.

William H. Rehnquist was nominated to the Supreme Court by President Nixon on October 21, 1971, and joined the Court as its 100th member on January 7, 1972. In 1986, President Reagan nominated him as our nation's 16th Chief Justice, and he took the oath for that office on September 26, 1986.

In his nearly 34 years on the Court, Chief Justice Rehnquist wrote 458 opinions for the Court—beginning with

*Schneble* v. *Florida* in 1972 and ending with *Van Orden* v. *Perry* in 2005. He served with 16 other Justices.

Many have described the Chief's legacy in specific areas of the law, such as criminal procedure, federalism, state immunity, and freedom of religion, but perhaps his most significant contribution was broader than any particular area of the law. Over his years on this bench, Chief Justice Rehnquist helped bring a sharper focus to the work of the Court. This manifested itself in many ways. During oral arguments he would maintain focus on the precise question upon which the Court had granted certiorari—often to the frustration of arguing counsel.

An assertion by a lawyer about what a statute *meant* was likely to be met by a question from the Chief about what it *said.* Perhaps his trademark question from the bench, regularly asked whenever a lawyer propounded a broad assertion on a point of law, was "Which one of our cases stands for that proposition?" A tough spot for the advocate who couldn't think of one. What was remarkable was the Chief's ability to distinguish on-the-spot any offered citation that the Chief thought was not on point.

The Chief brought the same rigor he expected of counsel to his own work. His opinions are notable for being clear and concise. They generally exhibit a spareness that the Chief thought was beneficial not only to lower courts and lawyers bound to apply them, but also to proper development of the law. There were exceptions to this rule—an opinion on an obscure Postal Service regulation might contain a fascinating sidebar on the history of the Pony Express, the minutiae of a water-rights opinion might be broken up by a disquisition on the first irrigation project in the arid west. That was just the Chief's love of history and a good story coming through, and the readers of his opinions were richer for it.

The Chief's colleagues on the bench have spoken often of their high regard and genuine affection for him, and the fairness with which he administered the Court. From the time he hung out a shingle in Phoenix for a two-person firm in which his partner was the head of the Young Democrats, William Rehnquist never allowed differing views on even fundamental issues to prevent him from enjoying warm and close friendships with people from all walks of life.

You heard the Chief Justice described in the Bar meeting as a great lawyer, mentor, teacher, colleague, and friend. There is no doubt he was first and foremost a loving husband to Nan and father to his children Jim, Janet, and Nancy. He managed to make it home for dinner almost every evening, and to take a month's vacation with his family each summer.

Chief Justice Rehnquist was an accomplished historian who wrote four books. He could quote poetry for any occasion. Name just about any city in the world, he could likely tell you its population and weather, and probably the nearest body of water or mountain range. He enjoyed card and board games, was a trivia and charades expert, and was the only person I have ever witnessed lie down on his stomach to line up a shot at croquet.

He was a patriot who loved and served his country. More than anyone I have ever known, he trusted in himself. He was direct, straightforward, utterly without pretense, and completely unaffected in manner.

Ralph Waldo Emerson's 1841 essay, "Self-Reliance," contains a line that the Chief liked: "Trust thyself: every heart vibrates to that iron string." A further passage in the essay aptly describes the Chief's approach to the law and to life. Emerson's words:

> "What I must do is all that concerns me, not what the people think. This rule, equally arduous in actual and in intellectual life, may serve for the whole distinction between greatness and meanness. It is the harder because you will always find those who think they know what your duty is better than you know it. It is easy in the world to live after the world's opinion; it is easy in solitude to live after our own; but the great man is he who in the midst of the crowd keeps with perfect sweetness the independence of solitude."

We pay tribute today to a great man. He will be missed by his colleagues, friends, family, and all those whose lives he touched.

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

## OCTOBER TERM, 2005

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## TEXACO INC. *v.* DAGHER ET AL.

### CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–805. Argued January 10, 2006—Decided February 28, 2006*

Petitioners, Texaco Inc. and Shell Oil Co., collaborated in a joint venture, Equilon Enterprises, to refine and sell gasoline in the western United States under the two companies' original brand names. After Equilon set a single price for both brands, respondents, Texaco and Shell Oil service station owners, brought suit alleging that, by unifying gas prices under the two brands, petitioners had violated the *per se* rule against price fixing long recognized under § 1 of the Sherman Act, see, *e. g., Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643, 647. Granting petitioners summary judgment, the District Court determined that the rule of reason, rather than a *per se* rule, governs respondents' claim, and that, by eschewing rule of reason analysis, respondents had failed to raise a triable issue of fact. The Ninth Circuit reversed, characterizing petitioners' position as a request for an exception to the *per se* price-fixing prohibition, and rejecting that request.

*Held:* It is not *per se* illegal under § 1 of the Sherman Act for a lawful, economically integrated joint venture to set the prices at which it sells its products. Although § 1 prohibits "[e]very contract [or] combination . . . in restraint of trade," 15 U. S. C. § 1, this Court has not taken a literal approach to that language, recognizing, instead, that

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*Together with No. 04–814, *Shell Oil Co.* v. *Dagher et al.*, also on certiorari to the same court.

Congress intended to outlaw only *unreasonable* restraints, *e. g., State Oil Co.* v. *Khan,* 522 U. S. 3, 10. Under rule of reason analysis, antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive. See, *e. g., id.,* at 10–19. *Per se* liability is reserved for "plainly anticompetitive" agreements. *National Soc. of Professional Engineers* v. *United States,* 435 U. S. 679, 692. While "horizontal" price-fixing agreements between two or more competitors are *per se* unlawful, see, *e. g., Catalano, supra,* at 647, this litigation does not present such an agreement, because Texaco and Shell Oil did not compete with one another in the relevant market—*i. e.,* gasoline sales to western service stations—but instead participated in that market jointly through Equilon. When those who would otherwise be competitors pool their capital and share the risks of loss and opportunities for profit, they are regarded as a single firm competing with other sellers in the market. *Arizona* v. *Maricopa County Medical Soc.,* 457 U. S. 332, 356. As such, Equilon's pricing policy may be price fixing in a literal sense, but it is not price fixing in the antitrust sense. The court below erred in reaching the opposite conclusion under the ancillary restraints doctrine, which governs the validity of restrictions imposed by a legitimate joint venture on nonventure activities. That doctrine has no application here, where the challenged business practice involves the core activity of the joint venture itself—the pricing of the very goods produced and sold by Equilon. Pp. 5–8.

369 F. 3d 1108, reversed.

THOMAS, J., delivered the opinion of the Court, in which all other Members joined, except ALITO, J., who took no part in the consideration or decision of the cases.

*Glen D. Nager* argued the cause for petitioners in both cases. With him on the briefs for petitioner in No. 04–805 were *Craig E. Stewart, Joe Sims,* and *Louis K. Fisher.* On the briefs for petitioner in No. 04–814 were *Ronald L. Olson, Bradley S. Phillips, Stuart N. Senator,* and *Paul J. Watford.*

*Jeffrey P. Minear* argued the cause for the United States as *amicus curiae* urging reversal in both cases. With him on the brief were *Solicitor General Clement, Acting Assistant Attorney General Barnett, Deputy Solicitor General Hungar, Catherine G. O'Sullivan,* and *Adam D. Hirsh.*

*Joseph M. Alioto* argued the cause for respondents in both cases. With him on the brief were *Daniel R. Shulman* and *Gregory Merz.*†

JUSTICE THOMAS delivered the opinion of the Court.

From 1998 until 2002, petitioners Texaco Inc. and Shell Oil Co. collaborated in a joint venture, Equilon Enterprises, to refine and sell gasoline in the western United States under the original Texaco and Shell Oil brand names. Respondents, a class of Texaco and Shell Oil service station owners, allege that petitioners engaged in unlawful price fixing when Equilon set a single price for both Texaco and Shell Oil brand gasoline. We granted certiorari to determine whether it is *per se* illegal under § 1 of the Sherman Act, 15 U. S. C. § 1, for a lawful, economically integrated joint venture to set the prices at which the joint venture sells its products. We conclude that it is not, and accordingly we reverse the contrary judgment of the Court of Appeals.

## I

Historically, Texaco and Shell Oil have competed with one another in the national and international oil and gasoline markets. Their business activities include refining crude oil into gasoline, as well as marketing gasoline to downstream purchasers, such as the service stations represented in respondents' class action.

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†Briefs of *amici curiae* urging reversal in both cases were filed for the American Bankers Association et al. by *W. Stephen Smith* and *Beth S. Brinkmann;* for the American Petroleum Institute by *Robert A. Long, Jr., Harry M. Ng,* and *Douglas W. Morris;* for the Chamber of Commerce of the United States of America by *Raymond A. Jacobsen, Jr., Stephen A. Bokat, Robin S. Conrad,* and *Amar D. Sarwal;* for Verizon Communications Inc. by *Roy T. Englert, Jr., Donald J. Russell, John Thorne,* and *Paul J. Larkin, Jr.;* and for Visa U. S. A. Inc. et al. by *M. Laurence Popofsky* and *Stephen V. Bomse.*

*Stephen F. Ross* filed a brief for the American Antitrust Institute as *amicus curiae* urging affirmance in both cases.

Briefs of *amici curiae* were filed in both cases for the Northwest Ohio Physician Specialists Cooperative, LLC, by *Charles D. Weller* and *Frederick Byers;* and for the Retail Industry Leaders Association et al. by *Lloyd Constantine* and *Michelle A. Peters. Steve C. Vaughn* filed a brief for the Parker Hannifin Corp. as *amicus curiae* in No. 04–805.

In 1998, Texaco and Shell Oil formed a joint venture, Equilon, to consolidate their operations in the western United States, thereby ending competition between the two companies in the domestic refining and marketing of gasoline. Under the joint venture agreement, Texaco and Shell Oil agreed to pool their resources and share the risks of and profits from Equilon's activities. Equilon's board of directors would comprise representatives of Texaco and Shell Oil, and Equilon gasoline would be sold to downstream purchasers under the original Texaco and Shell Oil brand names. The formation of Equilon was approved by consent decree, subject to certain divestments and other modifications, by the Federal Trade Commission, see *In re Shell Oil Co.*, 125 F. T. C. 769 (1998), as well as by the state attorneys general of California, Hawaii, Oregon, and Washington. Notably, the decrees imposed no restrictions on the pricing of Equilon gasoline.

After the joint venture began to operate, respondents brought suit in District Court, alleging that, by unifying gasoline prices under the two brands, petitioners had violated the *per se* rule against price fixing that this Court has long recognized under §1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U. S. C. §1. See, *e. g., Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643, 647 (1980) *(per curiam).* The District Court awarded summary judgment to Texaco and Shell Oil. It determined that the rule of reason, rather than a *per se* rule or the quick look doctrine, governs respondents' claim, and that, by eschewing rule of reason analysis, respondents had failed to raise a triable issue of fact. The Ninth Circuit reversed, characterizing petitioners' position as a request for an "exception to the *per se* prohibition on price-fixing," and rejecting that request. *Dagher* v.

*Saudi Refining, Inc.*, 369 F. 3d 1108, 1116 (2004). We consolidated Texaco's and Shell Oil's separate petitions and granted certiorari to determine the extent to which the *per se* rule against price fixing applies to an important and increasingly popular form of business organization, the joint venture. 545 U. S. 1138 (2005).

## II

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U. S. C. §1. This Court has not taken a literal approach to this language, however. See, *e. g., State Oil Co.* v. *Khan,* 522 U. S. 3, 10 (1997) ("[T]his Court has long recognized that Congress intended to outlaw only *unreasonable* restraints" (emphasis added)). Instead, this Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful. See, *e. g., id.,* at 10–19. *Per se* liability is reserved for only those agreements that are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *National Soc. of Professional Engineers* v. *United States,* 435 U. S. 679, 692 (1978). Accordingly, "we have expressed reluctance to adopt *per se* rules . . . 'where the economic impact of certain practices is not immediately obvious.'" *State Oil, supra,* at 10 (quoting *FTC* v. *Indiana Federation of Dentists,* 476 U. S. 447, 458–459 (1986)).

Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are *per se* unlawful. See, *e. g., Catalano, supra,* at 647. These cases do not present such an agreement, however, because Texaco and Shell Oil did not compete with one another in the relevant market—namely, the sale of gasoline to service stations in the western United States—but instead participated in that market jointly through their investments in Equilon.[1] In other words, the pricing policy challenged here amounts to little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products. Throughout Equilon's existence, Texaco and Shell Oil shared in the profits of Equilon's activities in their role as investors, not competitors. When "persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . such joint ventures [are] regarded as a single firm competing with other sellers in the market." *Arizona* v. *Maricopa County Medical Soc.*, 457 U. S. 332, 356 (1982). As such, though Equilon's pricing policy may be price fixing in a literal sense, it is not price fixing in the antitrust sense. See *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 9 (1979) ("When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act").

This conclusion is confirmed by respondents' apparent concession that there would be no *per se* liability had Equilon simply chosen to sell its gasoline under a single brand. See Tr. of Oral Arg. 34. We see no reason to treat Equilon differently just because it chose to sell gasoline under two distinct brands at a single price. As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price. If Equilon's price unification policy is anticompetitive, then respondents should have challenged it pursuant to the rule of reason.[2] But it would be inconsistent with this Court's antitrust precedents to condemn the internal pricing decisions of a legitimate joint venture as *per se* unlawful.[3]

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[1] We presume for purposes of these cases that Equilon is a lawful joint venture. Its formation has been approved by federal and state regulators, and there is no contention here that it is a sham. As the court below noted: "There is a voluminous record documenting the economic justifications for creating the joint ventures. [T]he defendants concluded that numerous synergies and cost efficiencies would result" by creating Equilon as well as a parallel venture, Motiva Enterprises, in the eastern United States, and "that nationwide there would be up to $800 million in cost savings annually." 369 F. 3d 1108, 1111 (CA9 2004). Had respondents challenged Equilon itself, they would have been required to show that its creation was anticompetitive under the rule of reason. See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 768 (1984).

The court below reached the opposite conclusion by invoking the ancillary restraints doctrine. 369 F. 3d, at 1118–1124. That doctrine governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities. See, *e. g., National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 113–115 (1984); *Citizen Publishing Co.* v. *United States*, 394 U. S. 131, 135–136 (1969). Under the doctrine, courts must determine whether the nonventure restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid. We agree with petitioners that the ancillary restraints doctrine has no application here, where the business practice being challenged involves the core activity of the joint venture itself—namely, the pricing of the very goods produced and sold by Equilon. And even if we were to invoke the doctrine in these cases, Equilon's pricing policy is clearly ancillary to the sale of its own products. Judge Fernandez, dissenting from the ruling of the court below, put it well:

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[2] Respondents have not put forth a rule of reason claim. 369 F. 3d, at 1113. Accordingly, we need not address petitioners' alternative argument that § 1 of the Sherman Act is inapplicable to joint ventures.

[3] Respondents alternatively contend that petitioners should be held liable under the quick look doctrine. To be sure, we have applied the quick look doctrine to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability. See *California Dental Assn.* v. *FTC*, 526 U. S. 756, 770 (1999). But for the same reasons that *per se* liability is unwarranted here, we conclude that petitioners cannot be held liable under the quick look doctrine.

> "In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same, as any other entity could. What could be more integral to the running of a business than setting a price for its goods and services?" 369 F. 3d, at 1127.

See also *Broadcast Music, supra,* at 23 ("Joint ventures and other cooperative arrangements are . . . not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all").

* * *

Because the pricing decisions of a legitimate joint venture do not fall within the narrow category of activity that is *per se* unlawful under § 1 of the Sherman Act, respondents' antitrust claim cannot prevail. Accordingly, the judgment of the Court of Appeals is reversed.

*It is so ordered.*

JUSTICE ALITO took no part in the consideration or decision of these cases.

# SCHEIDLER ET AL. *v.* NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 04–1244. Argued November 30, 2005—Decided February 28, 2006*

Respondents, a national nonprofit organization that supports the legal availability of abortions and two health care clinics that perform abortions, filed a class action alleging that petitioners, individuals and organizations that oppose legal abortion, engaged in a nationwide conspiracy to shut down abortion clinics through violence and other unlawful acts. Arguing that petitioners' activities amounted in context to extortionate acts that created a pattern of racketeering activity, respondents based their claims on, *inter alia*, the Hobbs Act, which makes it a federal crime to "obstruc[t], dela[y], or affec[t] commerce . . . by robbery or extortion . . . or commit[ting] or threaten[ing] physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section," 18 U. S. C. § 1951(a), and on the Racketeer Influenced and Corrupt Organizations Act (RICO), which defines a proscribed "pattern of racketeering activity," § 1962(a), in terms of certain predicate acts that include extortion, see § 1961(1). After trial, the jury concluded that petitioners violated RICO's civil provisions, the Hobbs Act, and other extortion-related laws. In *Scheidler* v. *National Organization for Women, Inc.*, 537 U. S. 393 *(NOW II)*, this Court reversed the Seventh Circuit's affirmance of the jury's award of damages and the District Court's issuance of a permanent nationwide injunction. The Court noted that the Hobbs Act defines "extortion" as necessarily including the improper " 'obtaining of property from another,' " *id.*, at 400 (quoting § 1951(b)(2)); observed that the claimed "property" here consisted of a woman's right to seek clinic services and the rights of clinic staff to perform their jobs and of clinics to provide care free from wrongful threats, violence, coercion, and fear, *id.*, at 400–401; decided that characterizing petitioners' actions as an "obtaining of property from" respondents went well beyond permissible boundaries, *id.*, at 402; and held, therefore, that petitioners did not commit extortion as defined by the Hobbs Act, *id.*, at 397. The Court concluded that, because all of the predicate acts supporting the jury's finding of a RICO violation had to

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*Together with No. 04–1352, *Operation Rescue* v. *National Organization for Women, Inc., et al.*, also on certiorari to the same court.

be reversed, the judgment that petitioners violated RICO must also be reversed, *id.*, at 411. On remand, the Court of Appeals decided that, because this Court had not considered respondents' alternative theory that the jury's RICO verdict rested not only on extortion-related conduct, but also on four instances (or threats) of physical violence *unrelated* to extortion, the cases must be remanded to the District Court to determine whether these four acts alone might constitute Hobbs Act violations (sufficient, as predicate acts under RICO, to support the injunction).

*Held:* Physical violence unrelated to robbery or extortion falls outside the Hobbs Act's scope. Congress did not intend to create a freestanding physical violence offense. It did intend to forbid acts or threats of physical violence in furtherance of a plan or purpose to engage in what the Act refers to as robbery or extortion (and related attempts or conspiracies). Pp. 16–23.

(a) The more restrictive reading of the statutory text—the one tying the prohibited violence to robbery or extortion—is correct. For one thing, it is the more natural reading. The text preceding the physical violence clause does not forbid *obstructing, delaying, or affecting commerce;* rather, it forbids *obstructing, delaying, or affecting commerce "by robbery or extortion."* § 1951(a) (emphasis added). This means that behavior that obstructs, delays, or affects commerce is a "violation" of the statute only if it also involves robbery or extortion (or related attempts or conspiracies). Consequently, the reference in the physical violence clause to actions or threats of violence "in furtherance of a plan or purpose *to do anything in violation of this section*" seems to mean acts or threats of violence in furtherance of a plan or purpose *to engage in robbery or extortion,* for that is the only kind of behavior that the section otherwise makes a violation. This restrictive reading is further supported by the fact that Congress often intends such statutory terms as "affect commerce" or "in commerce" to be read as terms of art connecting the congressional exercise of legislative authority with the constitutional provision (here, the Commerce Clause) granting that authority. See, *e. g., Allied-Bruce Terminix Cos.* v. *Dobson,* 513 U. S. 265, 273. Such jurisdictional language may limit, but it will not primarily define, the behavior that the statute calls a "violation" of federal law. Cf. *Jones* v. *United States,* 529 U. S. 848, 854. Moreover, the statute's history supports the more restrictive reading: Both of the Hobbs Act's predecessor statutes made clear that the physical violence they prohibited was not violence in furtherance of a plan to injure commerce, but violence in furtherance of a plan to injure commerce through coercion or extortion (1934 Act) or through extortion or robbery (1946 Act). The

Hobbs Act's legislative history contains nothing to the contrary. That the present statutory language is less clear than the 1946 version does not reflect a congressional effort to redefine the crime. To the contrary, Congress revised the Act's language in 1948 as part of its general revision of the Criminal Code, which "was not intended to create new crimes but to recodify those then in existence." *Morissette* v. *United States*, 342 U. S. 246, 269, n. 28. The Court will not presume the revision worked a change in the underlying substantive law absent a clearly expressed intent to do so. *Keene Corp.* v. *United States*, 508 U. S. 200, 209. Here there is no evidence of any such intent. Finally, respondents' interpretation broadens the Hobbs Act's scope well beyond what case law has assumed. It would federalize much ordinary criminal behavior, ranging from simple assault to murder, that typically is the subject of state, not federal, prosecution. Congress did not intend the Hobbs Act to have so broad a reach. See, *e. g., NOW II, supra*, at 405. Other Courts of Appeals have rejected respondents' construction of the Act. And in 1994, Congress enacted the Freedom of Access to Clinic Entrances Act, 18 U. S. C. §248(a)(3), which was aimed specifically at the type of activity at issue in this litigation, thereby suggesting that Congress did not believe that the Hobbs Act already addressed that activity. Pp. 16–21.

(b) Respondents' reliance on the canon of statutory construction favoring interpretations that give a function to each word in a statute, thereby avoiding linguistic superfluity, is misplaced. They claim that, because the definitions of robbery or extortion (or related attempts or conspiracies) already encompass robbery or extortion that take place through acts of violence (or related threats), see §§1951(b)(1) and (2), there would be no reason for §1951(a) to contain its physical violence clause unless Congress intended to create a freestanding offense. Petitioners, however, have found a small amount of additional work for the clause to do. The Scheidler petitioners point to a hypothetical mobster who threatens violence and demands payment from a business. Those threats constitute attempted extortion; but the subsequent acts of violence against a noncomplying business by the mobster's subordinates might not constitute attempted extortion or be punishable as a conspiracy to commit extortion if the subordinates were not privy to the mobster's plan, absent the specific prohibition of physical violence in furtherance of a plan to commit extortion. The Government adds that the clause permits prosecutors to bring multiple charges for the same conduct; *e. g.*, a robber who injured bystanders could be charged with the separate Hobbs Act crimes of robbery and of using violence in furtherance of the robbery. While this additional work is concededly small, Congress' intent is clear. Interpretive canons are designed to help courts determine what Congress intended, not to lead them to interpret the law contrary to that intent. Pp. 21–23.

91 Fed. Appx. 510, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which all other Members joined, except ALITO, J., who took no part in the consideration or decision of the cases.

*Alan Untereiner* argued the cause for petitioners in both cases. With him on the briefs in No. 04–1244 were *Roy T. Englert, Jr.*, *Kathryn S. Zecca*, *Noah Messing*, *Thomas Brejcha*, *Deborah Fischer*, and *D. Colette Wilson*. On the briefs in No. 04–1352 were *Jay Alan Sekulow*, *Walter M. Weber*, *Paul J. Larkin, Jr.*, *Stuart J. Roth*, *Vincent P. McCarthy*, *Ann-Louise Lohr*, *Thomas P. Monaghan*, *John P. Tuskey*, *Laura B. Hernandez*, *Shannon D. Woodruff*, *Larry L. Crain*, and *Robert W. Ash*.

*Lisa S. Blatt* argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Acting Solicitor General Kneedler*, *Acting Assistant Attorney General Richter*, *Deputy Solicitor General Dreeben*, *Kathleen A. Felton*, and *Frank Marine*.

*Erwin Chemerinsky* argued the cause for the National Organization for Women, Inc., et al., respondents in both cases. With him on the brief were *Paul Hoffman*, *Laurie Levenson*, *Catherine Fisk*, *Fay Clayton*, *Lowell E. Sachnoff*, *Jack L. Block*, and *Frank Susman*.†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the State of Alabama et al. by *Troy King*, Attorney General of Alabama, and *Kevin C. Newsom*, Solicitor General, and by the Attorneys General for their respective States as follows: *John W. Suthers* of Colorado, *M. Jane Brady* of Delaware, *Phill Kline* of Kansas, *Michael A. Cox* of Michigan, *Jim Petro* of Ohio, *Lawrence E. Long* of South Dakota, *Greg Abbott* of Texas, and *Mark L. Shurtleff* of Utah; for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt*, *James B. Coppess*, and *Laurence Gold*; for Americans United for Life by *Clarke D. Forsythe*, *Denise M. Burke*, and *G. Robert Blakey*; for Concerned Women for America by *Theresa Schrempp* and *Mark L. Lorbiecki*;

JUSTICE BREYER delivered the opinion of the Court.

A section of Title 18 of the United States Code (called the Hobbs Act) says that an individual commits a federal crime if he or she "obstructs, delays, or affects commerce" by (1) "robbery," (2) "extortion," or (3) "commit[ting] or threaten[ing] *physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section.*" § 1951(a) (emphasis added). The dispute in these cases concerns the meaning of the underscored words, in particular the words, "in furtherance of a plan or purpose to do anything in violation of this section." Does this phrase refer to (violence committed pursuant to) those plans or purposes that affect interstate commerce *through robbery or extortion?* Or does it refer to (violence committed pursuant to) those plans or purposes that affect interstate commerce, plain and simple? If the former, the statute governs only a limited subset of violent behavior, namely, behavior connected with robbery and extortion. If the latter, the statute governs a far broader range of human activity, namely, all violent actions (against persons or property) that affect interstate commerce. In our view, the

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for Consistent Life et al. by *Edward McGlynn Gaffney, Jr., Joseph Mathias Cosgrove,* and *Jeffrey S. Kerr;* and for the Life Legal Defense Foundation by *Catherine W. Short* and *Andrew W. Zepeda.*

Briefs of *amici curiae* urging affirmance in both cases were filed for the Feminist Majority Foundation et al. by *Steven G. Gey;* for NARAL Pro-Choice America et al. by *Maria T. Vullo;* for the Religious Coalition for Reproductive Choice et al. by *Deanne M. Ottaviano* and *David J. Pfeffer;* and for Abner J. Mikva et al. by *Molly S. Boast.*

Briefs of *amici curiae* in both cases were filed for the Lawyers' Committee for Civil Rights Under Law et al. by *Joseph R. Bankoff, Michael L. Foreman, Sarah C. Crawford,* and *Dennis Courtland Hayes;* for the Legal Defense for Unborn Children by *Alan Edward Ernest;* for Emily Lyons by *Pamela L. Sumners;* and for 47 Members of the United States Congress by *Jon B. Eisenberg.*

*M. Reed Hopper* filed a brief for the Pacific Legal Foundation as *amicus curiae* in No. 04–1244.

former, more restrictive reading of the Act is the correct interpretation.

## I

Petitioners are individuals (and organizations) who engage in pro-life, anti-abortion protest activities. Respondents are health care clinics that perform abortions and a pro-choice national nonprofit organization that supports the legal availability of abortions. In 1986, (pro-choice) respondents, believing that (pro-life) petitioners had tried to disrupt activities at health care clinics that perform abortions through violence and various other unlawful activities, brought this legal action, which sought damages and an injunction forbidding (pro-life) petitioners from engaging in such activities anywhere in the Nation.

Respondents based their legal claims upon the Hobbs Act, certain other laws that forbid extortion, and a federal antiracketeering statute, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1962. Respondents argued that petitioners' clinic-related protest activities amounted in context to extortion. They added that these extortionate acts created a "pattern of racketeering activity"—a pattern that RICO defines in terms of certain predicate acts that include acts of extortion. See § 1961(1) (2000 ed., Supp. III). And they sought a permanent injunction, which they believed RICO authorized. See § 1964 (2000 ed.).

Initially, the District Court dismissed their complaint. It concluded that RICO requires proof that the alleged criminal acts were motivated by an economic purpose—a purpose that is lacking here. *National Organization for Women, Inc.* v. *Scheidler*, 765 F. Supp. 937 (ND Ill. 1991). The Court of Appeals for the Seventh Circuit affirmed. *National Organization for Women, Inc.* v. *Scheidler*, 968 F. 2d 612 (1992). But this Court held that the statute "requires no such economic motive," and therefore reversed the Court of Appeals and remanded the case for further proceedings. *National*

*Organization for Women, Inc.* v. *Scheidler*, 510 U. S. 249, 252 (1994).

After trial, the jury found that petitioners had engaged in a host of extortionate, or extortion-related, acts. It awarded treble damages to two of the respondents (a matter not at issue here), and the District Court entered a nationwide injunction. See §§ 1964(a), (c). The Court of Appeals affirmed. 267 F. 3d 687 (2001).

This Court again reversed. *Scheidler* v. *National Organization for Women, Inc.*, 537 U. S. 393 (2003) *(NOW II).* We noted that the Hobbs Act defines "extortion" as necessarily including the improper "'obtaining of property from another.'" *Id.*, at 400 (quoting § 1951(b)(2)). We pointed out that the claimed "property" consisted of "a woman's right to seek medical services from a clinic, the right of the doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion and fear." *Id.*, at 400–401 (internal quotation marks omitted). We decided that "[w]hatever the outer boundaries may be, the effort to characterize petitioners' actions here as an 'obtaining of property from' respondents is well beyond them." *Id.*, at 402. Accordingly, we held that "because they did not 'obtain' property from respondents," petitioners "did not commit extortion" as defined by the Hobbs Act. *Id.*, at 397. We found that the state extortion law violations, and other extortion-related violations, were flawed for the same reason and must also be set aside. *Id.*, at 410.

Our opinion concluded:

> "Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated." *Id.*, at 411.

On remand, the Court of Appeals did not order the District Court to terminate the cases or to vacate its injunction. Instead, the Court of Appeals considered respondents' argument that the jury's RICO verdict rested not only upon many instances of extortion-related conduct, but also upon four instances (or threats) of physical violence *unrelated* to extortion. 91 Fed. Appx. 510, 512 (2004). The Court of Appeals decided that the parties had not presented this theory to this Court and, as a result, we had no occasion to consider whether these four acts alone might constitute Hobbs Act violations (sufficient, as predicate acts under RICO, to support the nationwide injunction). See *id.*, at 513. The Court of Appeals remanded the cases to the District Court to make that determination. *Ibid.*

Petitioners sought certiorari to review this ruling. We granted the writ to consider the following three questions:

> (1) Whether the Court of Appeals improperly disregarded this Court's mandate in *NOW II* by holding that the injunction issued by the District Court might not need to be vacated;
>
> (2) Whether the Hobbs Act forbids violent conduct unrelated to extortion or robbery; and
>
> (3) Whether RICO authorizes a private party to obtain an injunction.

We now answer the second question. We hold that physical violence unrelated to robbery or extortion falls outside the scope of the Hobbs Act. And since our answer to the second question requires an entry of judgment in petitioners' favor, we shall not answer the first or third questions.

## II

We first set forth the Hobbs Act's text. The relevant statutory section imposes criminal liability on

> "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or com-

> modity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section* . . . ." 18 U. S. C. § 1951(a) (emphasis added).

The question, as we have said, concerns the meaning of the phrase that modifies the term "physical violence," namely, the words "in furtherance of a plan or purpose to do anything in violation of this section." Do those words refer to violence (1) that furthers a plan or purpose to "affec[t] commerce . . . by robbery or extortion," or to violence (2) that furthers a plan or purpose simply to "affec[t] commerce"? We believe the former, more restrictive, reading of the text—the reading that ties the violence to robbery or extortion—is correct.

For one thing, the language of the statute makes the more restrictive reading the more natural one. The text that precedes the physical violence clause does not forbid *obstructing, delaying, or affecting commerce* (or the movement of any article or commodity in commerce); rather, it forbids *obstructing, delaying, or affecting commerce "by robbery or extortion." Ibid.* (emphasis added). This language means that behavior that obstructs, delays, or affects commerce is a "violation" of the statute only if that behavior also involves robbery or extortion (or related attempts or conspiracies). Consequently, the reference in the physical violence clause to actions or threats of violence "in furtherance of a plan or purpose *to do anything in violation of this section*" (emphasis added) would seem to mean acts or threats of violence in furtherance of a plan or purpose *to engage in robbery or extortion,* for that is the only kind of behavior that the section otherwise makes a violation.

This restrictive reading is further supported by the fact that Congress often intends such statutory terms as "affect commerce" or "in commerce" to be read as terms of art connecting the congressional exercise of legislative authority with the constitutional provision (here, the Commerce Clause) that grants Congress that authority. See *Allied-Bruce Terminix Cos.* v. *Dobson,* 513 U. S. 265, 273 (1995); *Russell* v. *United States,* 471 U. S. 858, 859 (1985). Such jurisdictional language may limit, but it will not primarily define, the behavior that the statute calls a "violation" of federal law. Cf. *Jones* v. *United States,* 529 U. S. 848, 854 (2000) (holding that by using the term "affecting . . . commerce," " 'Congress did not define the crime described in [18 U. S. C.] § 844(i) as the explosion of a building whose damage or destruction might affect interstate commerce,' " and noting that the Court must look to other "qualifying language" in the provision to define the offense).

For another thing, the statute's history supports the more restrictive reading. Congress enacted the Hobbs Act's predecessor in 1934. See Anti-Racketeering Act, ch. 569, 48 Stat. 979 (reproduced in Appendix A, *infra*). That predecessor Act prohibited coercion and extortion appropriately connected with interstate commerce, and placed these prohibitions in §§ 2(a) and 2(b), respectively. 48 Stat. 980. The Act went on in § 2(c) to impose criminal liability on anyone who, in connection with interstate commerce, "[c]ommits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b)." *Ibid.;* see also *NOW II,* 537 U. S., at 407. The 1934 Act explicitly linked § 2(c), the physical violence subsection, with §§ 2(a) and 2(b). It thereby made crystal clear that the physical violence that it prohibited was not violence in furtherance of a plan to injure commerce, but violence in furtherance of a plan to injure commerce *through coercion or extortion.*

In 1946, Congress enacted a superseding law, namely, the Hobbs Act. Ch. 537, 60 Stat. 420 (reproduced in Appendix B, *infra*). The new law changed the old law in two significant respects: It added robbery while omitting coercion.

*NOW II*, *supra*, at 407; see *United States* v. *Culbert*, 435 U. S. 371, 377 (1978) ("The bill that eventually became the Hobbs Act . . . substituted specific prohibitions against robbery and extortion for the Anti-Racketeering Act's language"). The new Act, like the old Act, was absolutely explicit in respect to the point here at issue, the necessary link between physical violence and other crimes (now extortion and robbery).

The 1946 Hobbs Act reads as follows:

> "SEC. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> "SEC. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
>
> "SEC. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.
>
> "SEC. 5. Whoever commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of section 2* shall be guilty of a felony." 60 Stat. 420 (emphasis added).

As § 2 makes clear, the statute prohibits *robbery* and *extortion*. As § 5's reference to § 2 makes clear, the statute prohibits violence *only* when that violence furthers a plan or purpose to affect commerce by robbery or extortion. Each of the statute's other sections reflects the same approach; each explicitly refers back to § 2's prohibition against robbery and extortion.

The Act's legislative history contains nothing to the contrary. Indeed, the Committee Reports and floor debates emphasized that "the purpose of the bill was 'to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce by robbery or extortion *as defined in the bill.*'" *Culbert, supra,* at 377 (quoting H. R. Rep. No. 238, 79th Cong., 1st Sess., 9 (1945); emphasis added in *Culbert*); see *Culbert, supra,* at 376–378 (discussing legislative history). They nowhere suggested that Congress intended to make physical violence a freestanding crime.

The present Hobbs Act language is less clear than the 1946 version. But the linguistic changes do not reflect a congressional effort to redefine the crime. To the contrary, Congress revised the Hobbs Act's language in 1948 as part of its general revision of the Criminal Code. That "1948 Revision was not intended to create new crimes but to recodify those then in existence." *Morissette* v. *United States,* 342 U. S. 246, 269, n. 28 (1952). This Court has written that it will "not presume that the revision worked a change in the underlying substantive law 'unless an intent to make such [a] chang[e] is clearly expressed.'" *Keene Corp.* v. *United States,* 508 U. S. 200, 209 (1993) (quoting *Fourco Glass Co.* v. *Transmirra Products Corp.,* 353 U. S. 222, 227 (1957); alteration made in *Keene*). And here there is no evidence of any such intent. Rather, the Reviser's Notes indicate that the linguistic changes to the Hobbs Act simply amount to "changes in phraseology and arrangement necessary to effect consolidation." H. R. Rep. No. 304, 80th Cong., 1st Sess., A131 (1947).

Finally, respondents' Hobbs Act interpretation broadens the Act's scope well beyond what case law has assumed. It would federalize much ordinary criminal behavior, ranging from simple assault to murder, behavior that typically is the subject of state, not federal, prosecution. Decisions of this Court have assumed that Congress did not intend the Hobbs Act to have so broad a reach. See *NOW II,* 537 U. S., at 405 (noting that the Hobbs Act embodied extortion, which required the obtaining of property, not coercion); *id.,* at 411 (GINSBURG, J., concurring) (coercion, which is not covered by the Hobbs Act, "more accurately describes the nature of petitioners' [non-property-related] actions" (internal quotation marks omitted)); *United States* v. *Enmons*, 410 U. S. 396, 410 (1973) (Hobbs Act does not reach violent activity by union members seeking higher wages because such violence is not extortion and Congress did not intend to "cover all overtly coercive conduct in the course of" a labor dispute).

Not surprisingly, other Courts of Appeals that have considered the question have rejected respondents' construction of the Act. See *United States* v. *Yankowski*, 184 F. 3d 1071 (CA9 1999); *United States* v. *Franks*, 511 F. 2d 25 (CA6 1975). And in 1994, Congress enacted a specific statute aimed directly at the type of abortion clinic violence and other activity at issue in this litigation, thereby suggesting it did not believe that the Hobbs Act already addressed that activity. See Freedom of Access to Clinic Entrances Act, 18 U. S. C. § 248(a)(3) (imposing criminal liability on anyone who "intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services").

## III

Respondents' contrary claim rests primarily upon a canon of statutory construction that favors interpretations that give a function to each word in a statute, thereby avoiding linguistic superfluity. See *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute'" (quoting *Montclair* v. *Ramsdell*, 107 U. S. 147, 152 (1883))). They claim that, because the definitions of robbery or extortion (or related attempts or conspiracies) already encompass robbery or extortion that takes place through acts of violence (or related threats), "[t]here would be no reason for the statute to include the clause prohibiting violence and threats of violence" unless Congress intended to create a freestanding offense. Brief for Respondents 25; see 18 U. S. C. § 1951(b)(1) (defining "robbery" as the "unlawful taking or obtaining of personal property . . . *by means of actual or threatened force, or violence*" (emphasis added)); § 1951(b)(2) (defining "extortion" as "the obtaining of property from another . . . *by wrongful use of actual or threatened force, violence, or fear*" (emphasis added)).

Petitioners, however, have found a small amount of additional work for the words to do. Brief for Petitioners in No. 04–1244, pp. 33–36; see also Brief for United States as *Amicus Curiae* 11–12. The Scheidler petitioners point to a hypothetical mobster who threatens violence and demands payment from a business. Those threats constitute attempted extortion; but the subsequent acts of violence against a noncomplying business by the subordinates of that mobster may not constitute attempted extortion and may not be punishable as a conspiracy to commit extortion if the subordinates were not privy to the mobster's plan. A specific prohibition of physical violence in furtherance of a plan to commit extortion would bring the subordinates' behavior within the statute's coverage. The United States adds that the physical violence clause permits prosecutors to bring multiple charges for the same conduct. For instance, the clause would apply to a defendant who injured bystanders during a robbery, permitting the Government to charge that defendant with the Hobbs Act crime of robbery and the separate Hobbs Act crime of using violence in furtherance of the robbery. Tr. of Oral Arg. 22.

We concede that this additional work is small. But the need for language to cover such instances, or perhaps simply a desire to emphasize the problem of violence, led Congress in the original 1946 version of the Hobbs Act to make clear that the statute prohibited, not all physical violence, but only physical violence in furtherance of *a plan or purpose to engage in robbery or extortion.* See *supra,* at 19. And it is similarly clear that Congress intended to carry this view forward into the 1948 recodification. See *supra,* at 20–21.

The canons of interpretation cannot lead us to a contrary conclusion. Those canons are tools designed to help courts better determine what Congress intended, not to lead courts to interpret the law contrary to that intent. *Chickasaw Nation* v. *United States*, 534 U. S. 84, 94 (2001) (noting that "canons are not mandatory rules" but guides "designed to help judges determine the Legislature's intent," and that "other circumstances evidencing congressional intent can overcome their force").

## IV

We conclude that Congress did not intend to create a freestanding physical violence offense in the Hobbs Act. It did intend to forbid acts or threats of physical violence in furtherance of a plan or purpose to engage in what the statute refers to as robbery or extortion (and related attempts or conspiracies). The judgment of the Court of Appeals is reversed, and the cases are remanded for entry of judgment for petitioners.

*It is so ordered.*

JUSTICE ALITO took no part in the consideration or decision of these cases.

## APPENDIXES TO OPINION OF THE COURT

### A

The Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979, provided:

> "AN ACT
>
> "To protect trade and commerce against interference by violence, threats, coercion, or intimidation.
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the term 'trade or commerce', as used

herein, is defined to mean trade or commerce between any States, with foreign nations, in the District of Columbia, in any Territory of the United States, between any such Territory or the District of Columbia and any State or other Territory, and all other trade or commerce over which the United States has constitutional jurisdiction.

"SEC. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

"(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages of a bona-fide employer to a bona-fide employee; or

"(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

"(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

"(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

"SEC. 3. (a) As used in this Act the term 'wrongful' means in violation of the criminal laws of the United States or of any State or Territory.

"(b) The terms 'property', 'money', or 'valuable considerations' used herein shall not be deemed to include wages paid by a bona-fide employer to a bona-fide employee." (Emphasis in original.)

## B

Title I of the Hobbs Anti-Racketeering Act of 1946, ch. 537, 60 Stat. 420, provided:

"SEC. 1. As used in this title—

"(a) The term 'commerce' means (1) commerce between any point in a State, Territory, or the District of Columbia and any point outside thereof, or between points within the same State, Territory, or the District of Columbia but through any place outside thereof, and (2) commerce within the District of Columbia or any Territory, and (3) all other commerce over which the United States has jurisdiction; and the term 'Territory' means any Territory or possession of the United States.

"(b) The term 'robbery' means the unlawful taking or obtaining of personal property, from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or anyone in his company at the time of the taking or obtaining.

"(c) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"SEC. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

"SEC. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

"SEC. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.

> "SEC. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.
>
> "SEC. 6. Whoever violates any section of this title shall, upon conviction thereof, be punished by imprisonment for not more than twenty years or by a fine of not more than $10,000, or both."

### C

The Hobbs Act, 18 U. S. C. § 1951, as amended in 1948, provides:

> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> "(b) As used in this section—
>
> "(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> "(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> "(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in

a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

"(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101–115, 151–166 of Title 29 or sections 151–188 of Title 45."

# ILLINOIS TOOL WORKS INC. ET AL. *v.* INDEPENDENT INK, INC.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 04–1329. Argued November 29, 2005—Decided March 1, 2006

Petitioners manufacture and market printing systems that include a patented printhead and ink container and unpatented ink, which they sell to original equipment manufacturers who agree that they will purchase ink exclusively from petitioners and that neither they nor their customers will refill the patented containers with ink of any kind. Respondent developed ink with the same chemical composition as petitioners' ink. After petitioner Trident's infringement action was dismissed, respondent filed suit seeking a judgment of noninfringement and invalidity of Trident's patents on the ground that petitioners are engaged in illegal "tying" and monopolization in violation of §§ 1 and 2 of the Sherman Act. Granting petitioners summary judgment, the District Court rejected respondent's argument that petitioners necessarily have market power as a matter of law by virtue of the patent on their printhead system, thereby rendering the tying arrangements *per se* violations of the antitrust laws. After carefully reviewing this Court's tying-arrangements decisions, the Federal Circuit reversed as to the § 1 claim, concluding that it had to follow this Court's precedents until overruled by this Court.

*Held:* Because a patent does not necessarily confer market power upon the patentee, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product. Pp. 33–46.

(a) Over the years, this Court's strong disapproval of tying arrangements has substantially diminished, as the Court has moved from relying on assumptions to requiring a showing of market power in the tying product. The assumption in earlier decisions that such "arrangements serve hardly any purpose beyond the suppression of competition," *Standard Oil Co. of Cal.* v. *United States,* 337 U. S. 293, 305–306, was rejected in *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U. S. 610, 622 *(Fortner II)*, and again in *Jefferson Parish Hospital Dist. No. 2* v. *Hyde,* 466 U. S. 2, both of which involved unpatented tying products. Nothing in *Jefferson Parish* suggested a rebuttable presumption of market power applicable to tying arrangements involving a patent on the tying good. Pp. 33–38.

(b) The presumption that a patent confers market power arose outside the antitrust context as part of the patent misuse doctrine, and migrated to antitrust law in *International Salt Co.* v. *United States,* 332 U. S. 392. See also *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488; *United States* v. *Loew's Inc.*, 371 U. S. 38. Pp. 38–40.

(c) When Congress codified the patent laws for the first time, it initiated the untwining of the patent misuse doctrine and antitrust jurisprudence. At the same time that this Court's antitrust jurisprudence continued to rely on the assumption that tying arrangements generally serve no legitimate business purpose, Congress began chipping away at that assumption in the patent misuse context from whence it came. Then, four years after *Jefferson Parish* repeated the presumption that patents confer market power, Congress amended the Patent Code to eliminate it in the patent misuse context. While that amendment does not expressly refer to the antitrust laws, it invites reappraisal of *International Salt*'s *per se* rule. After considering the congressional judgment reflected in the amendment, this Court concludes that tying arrangements involving patented products should be evaluated under the standards of cases like *Fortner II* and *Jefferson Parish* rather than the *per se* rule in *Morton Salt* and *Loew's.* Any conclusion that an arrangement is unlawful must be supported by proof of power in the relevant market rather than by a mere presumption thereof. Pp. 40–43.

(d) Respondent's alternatives to retention of the *per se* rule—that the Court endorse a rebuttable presumption that patentees possess market power when they condition the purchase of the patented product on an agreement to buy unpatented goods exclusively from the patentee, or differentiate between tying arrangements involving requirements ties and other types of tying arrangements—are rejected. Pp. 43–46.

(e) Because respondent reasonably relied on this Court's prior opinions in moving for summary judgment without offering evidence of the relevant market or proving petitioners' power within that market, respondent should be given a fair opportunity to develop and introduce evidence on that issue, as well as other relevant issues, when the case returns to the District Court. P. 46.

396 F. 3d 1342, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except ALITO, J., who took no part in the consideration or decision of the case.

*Andrew J. Pincus* argued the cause for petitioners. With him on the briefs were *Richard J. Favretto, Christopher J. Kelly, Nickolai G. Levin,* and *Stewart S. Hudnut.*

Counsel

*Deputy Solicitor General Hungar* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Clement, Acting Assistant Attorney General Barnett, Jeffrey P. Minear, Catherine G. O'Sullivan, Steven J. Mintz, Frances Marshall, John M. Whealan, Cynthia C. Lynch,* and *Thomas Krause.*

*Kathleen M. Sullivan* argued the cause for respondent. With her on the briefs were *Daniel H. Bromberg, Margret M. Caruso, Elizabeth B. Wydra,* and *Edward F. O'Connor.**

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Robert J. Grey, Jr., Richard J. Wallis,* and *Kevin D. McDonald;* for the Houston Intellectual Property Law Association by *Kenneth E. Kuffner;* for the Intellectual Property Law Association of Chicago by *Edward D. Manzo, Bradford P. Lyerla,* and *Glen P. Belvis;* for the Intellectual Property Owners Association by *Gary M. Hoffman, Kenneth W. Brothers,* and *Douglas K. Norman;* for the Motion Picture Association of America, Inc., et al. by *Daniel G. Swanson, Julian W. Poon, Daniel E. Robbins,* and *Victor S. Perlman;* for the New York Intellectual Property Law Association by *David F. Ryan;* for the Patent, Trademark & Copyright Section of the Bar Association of the District of Columbia by *David W. Long, Blair Elizabeth Taylor,* and *Lynn E. Eccleston;* for Pfizer Inc. by *Stephen A. Stack, Jr., George G. Gordon, Rebecca P. Dick,* and *Kent S. Bernard;* for Verizon Communications by *Richard G. Taranto, Aaron M. Panner,* and *John Thorne;* and for the Washington Legal Foundation by *William C. MacLeod, Daniel J. Popeo,* and *David Price.*

Briefs of *amici curiae* urging affirmance were filed for the District of Columbia et al. by *Robert J. Spagnoletti,* Attorney General of the District of Columbia, *Edward E. Schwab,* Deputy Attorney General, *Don A. Resnikoff,* Senior Assistant Attorney General, and *Anika Cooper,* Assistant Attorney General, by *Bill Lockyer,* Attorney General of California, *Richard M. Frank,* Chief Deputy Attorney General, *Tom Greene,* Chief Assistant Attorney General, *Kathleen Foote,* Senior Assistant Attorney General, and *Ann Marie Marciarille,* Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Charles J. Crist, Jr.,* of Florida, *Thomas J. Miller* of Iowa, *Charles C. Foti, Jr.,* of Louisiana, *J. Joseph Curran, Jr.,* of Maryland, *Thomas F. Reilly* of Massachusetts, *Jeremiah W. (Jay) Nixon* of Missouri, *Jim Petro* of Ohio, *Paul G. Summers* of Tennessee, *Mark L. Shurtleff* of Utah, *Darrell V. McGraw, Jr.,* of West Virginia, and *Patrick J. Crank* of Wyoming; for AARP et al. by *Barbara Jones, Bruce Vignery,* and *Michael Schuster;*

JUSTICE STEVENS delivered the opinion of the Court.

In *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S. 2 (1984), we repeated the well-settled proposition that "if the Government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power." *Id.*, at 16. This presumption of market power, applicable in the antitrust context when a seller conditions its sale of a patented product (the "tying" product) on the purchase of a second product (the "tied" product), has its foundation in the judicially created patent misuse doctrine. See *United States* v. *Loew's Inc.*, 371 U. S. 38, 46 (1962). In 1988, Congress substantially undermined that foundation, amending the Patent Act to eliminate the market power presumption in patent misuse cases. See 102 Stat. 4676, codified at 35 U. S. C. §271(d). The question presented to us today is whether the presumption of market power in a patented product should survive as a matter of antitrust law despite its demise in patent law. We conclude that the mere fact that a tying product is patented does not support such a presumption.

## I

Petitioners, Trident, Inc., and its parent, Illinois Tool Works Inc., manufacture and market printing systems that include three relevant components: (1) a patented piezoelectric impulse ink jet printhead; (2) a patented ink container, consisting of a bottle and valved cap, which attaches to the printhead; and (3) specially designed, but unpatented, ink.

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for the American Antitrust Institute et al. by *Jonathan Rubin;* for the International Imaging Technology Council et al. by *Patricia Judge;* for the National Association of Theatre Owners, Inc., et al. by *John T. Mitchell;* for Barry Nalebuff et al. by *Alan I. Horowitz;* and for F. M. Scherer by *Parker C. Folse III* and *Justin A. Nelson.*

*Patrick J. Coyne*, *Kenneth M. Frankel*, and *William C. Rooklidge* filed a brief of *amicus curiae* for the American Intellectual Property Law Association.

Petitioners sell their systems to original equipment manufacturers (OEMs) who are licensed to incorporate the printheads and containers into printers that are in turn sold to companies for use in printing barcodes on cartons and packaging materials. The OEMs agree that they will purchase their ink exclusively from petitioners, and that neither they nor their customers will refill the patented containers with ink of any kind.

Respondent, Independent Ink, Inc., has developed an ink with the same chemical composition as the ink sold by petitioners. After an infringement action brought by Trident against Independent was dismissed for lack of personal jurisdiction, Independent filed suit against Trident seeking a judgment of noninfringement and invalidity of Trident's patents.[1] In an amended complaint, it alleged that petitioners are engaged in illegal tying and monopolization in violation of §§1 and 2 of the Sherman Act. 15 U. S. C. §§1, 2.

After discovery, the District Court granted petitioners' motion for summary judgment on the Sherman Act claims. *Independent Ink, Inc.* v. *Trident, Inc.*, 210 F. Supp. 2d 1155, 1177 (CD Cal. 2002). It rejected respondent's submission that petitioners "necessarily have market power in the market for the tying product as a matter of law solely by virtue of the patent on their printhead system, thereby rendering [the] tying arrangements *per se* violations of the antitrust laws." *Id.*, at 1159. Finding that respondent had submitted no affirmative evidence defining the relevant market or establishing petitioners' power within it, the court concluded that respondent could not prevail on either antitrust claim. *Id.*, at 1167, 1173, 1177. The parties settled their other claims, and respondent appealed.

After a careful review of the "long history of Supreme Court consideration of the legality of tying arrangements," 396 F. 3d 1342, 1346 (2005), the Court of Appeals for the

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[1] Illinois Tool did not acquire Trident until February 19, 1999, approximately six months after this action commenced.

Federal Circuit reversed the District Court's decision as to respondent's § 1 claim, *id.*, at 1354. Placing special reliance on our decisions in *International Salt Co.* v. *United States*, 332 U. S. 392 (1947), and *Loew's*, 371 U. S. 38, as well as our *Jefferson Parish* dictum, and after taking note of the academic criticism of those cases, it concluded that the "fundamental error" in petitioners' submission was its disregard of "the duty of a court of appeals to follow the precedents of the Supreme Court until the Court itself chooses to expressly overrule them." 396 F. 3d, at 1351. We granted certiorari to undertake a fresh examination of the history of both the judicial and legislative appraisals of tying arrangements. 545 U. S. 1127 (2005). Our review is informed by extensive scholarly comment and a change in position by the administrative agencies charged with enforcement of the antitrust laws.

## II

American courts first encountered tying arrangements in the course of patent infringement litigation. See, *e. g.*, *Heaton-Peninsular Button-Fastener Co.* v. *Eureka Specialty Co.*, 77 F. 288 (CA6 1896). Such a case came before this Court in *Henry* v. *A. B. Dick Co.*, 224 U. S. 1 (1912), in which, as in the case we decide today, unpatented ink was the product that was "tied" to the use of a patented product through the use of a licensing agreement. Without commenting on the tying arrangement, the Court held that use of a competitor's ink in violation of a condition of the agreement—that the rotary mimeograph "'may be used only with the stencil, paper, ink and other supplies made by A. B. Dick Co.'"—constituted infringement of the patent on the machine. *Id.*, at 25–26. Chief Justice White dissented, explaining his disagreement with the Court's approval of a practice that he regarded as an "attempt to increase the scope of the monopoly granted by a patent . . . which tend[s] to increase monopoly and to burden the public in the exercise of their common rights." *Id.*, at 70. Two years later, Congress endorsed Chief Justice White's disapproval of tying arrangements, enacting § 3 of the Clayton Act. See 38 Stat. 731 (applying to "patented or unpatented" products); see also *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 517–518 (1917) (explaining that, in light of § 3 of the Clayton Act, *A. B. Dick* "must be regarded as overruled"). And in this Court's subsequent cases reviewing the legality of tying arrangements we, too, embraced Chief Justice White's disapproval of those arrangements. See, *e. g.*, *Standard Oil Co. of Cal.* v. *United States*, 337 U. S. 293, 305–306 (1949); *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 664–665 (1944).

In the years since *A. B. Dick*, four different rules of law have supported challenges to tying arrangements. They have been condemned as improper extensions of the patent monopoly under the patent misuse doctrine, as unfair methods of competition under § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45, as contracts tending to create a monopoly under § 3 of the Clayton Act, 15 U. S. C. § 14, and as contracts in restraint of trade under § 1 of the Sherman Act.[2] In all of those instances, the justification for the challenge rested on either an assumption or a showing that the defendant's position of power in the market for the tying product was being used to restrain competition in the market for the tied product. As we explained in *Jefferson Parish*, 466 U. S., at 12, "[o]ur cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms."

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[2] See, *e. g., Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S. 2, 9 (1984) (Sherman Act); *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 609 (1953) (Federal Trade Commission Act); *International Salt Co.* v. *United States*, 332 U. S. 392, 395–396 (1947) (Clayton Act and Sherman Act); *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488, 494 (1942) (patent misuse); *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 516 (1917) (same).

Over the years, however, this Court's strong disapproval of tying arrangements has substantially diminished. Rather than relying on assumptions, in its more recent opinions the Court has required a showing of market power in the tying product. Our early opinions consistently assumed that "[t]ying arrangements serve hardly any purpose beyond the suppression of competition." *Standard Oil Co.,* 337 U. S., at 305–306. In 1962, in *Loew's,* 371 U. S., at 47–48, the Court relied on this assumption despite evidence of significant competition in the market for the tying product. And as recently as 1969, Justice Black, writing for the majority, relied on the assumption as support for the proposition "that, at least when certain prerequisites are met, arrangements of this kind are illegal in and of themselves, and no specific showing of unreasonable competitive effect is required." *Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 394 U. S. 495, 498–499 *(Fortner I).* Explaining the Court's decision to allow the suit to proceed to trial, he stated that "decisions rejecting the need for proof of truly dominant power over the tying product have all been based on a recognition that because tying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way, the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie." *Id.,* at 503.

Reflecting a changing view of tying arrangements, four Justices dissented in *Fortner I,* arguing that the challenged "tie"—the extension of a $2 million line of credit on condition that the borrower purchase prefabricated houses from the defendant—might well have served a legitimate purpose. *Id.,* at 510 (opinion of White, J.); *id.,* at 520 (opinion of Fortas, J.). In his opinion, Justice White noted that promotional tie-ins may provide "uniquely advantageous deals" to purchasers. *Id.,* at 519. And Justice Fortas concluded that the arrangement was best characterized as "a sale of a single product with the incidental provision of financing." *Id.*, at 522.

The dissenters' view that tying arrangements may well be procompetitive ultimately prevailed; indeed, it did so in the very same lawsuit. After the Court remanded the suit in *Fortner I*, a bench trial resulted in judgment for the plaintiff, and the case eventually made its way back to this Court. Upon return, we unanimously held that the plaintiff's failure of proof on the issue of market power was fatal to its case—the plaintiff had proved "nothing more than a willingness to provide cheap financing in order to sell expensive houses." *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U. S. 610, 622 (1977) *(Fortner II)*.

The assumption that "[t]ying arrangements serve hardly any purpose beyond the suppression of competition," rejected in *Fortner II*, has not been endorsed in any opinion since. Instead, it was again rejected just seven years later in *Jefferson Parish*, where, as in *Fortner II*, we unanimously reversed a Court of Appeals judgment holding that an alleged tying arrangement constituted a *per se* violation of § 1 of the Sherman Act. 466 U. S., at 5. Like the product at issue in the *Fortner* cases, the tying product in *Jefferson Parish*—hospital services—was unpatented, and our holding again rested on the conclusion that the plaintiff had failed to prove sufficient power in the tying product market to restrain competition in the market for the tied product—services of anesthesiologists. 466 U. S., at 28–29.

In rejecting the application of a *per se* rule that all tying arrangements constitute antitrust violations, we explained:

> "[W]e have condemned tying arrangements when the seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market. . . .
>
> .     .     .     .     .

> "*Per se* condemnation—condemnation without inquiry into actual market conditions—is only appropriate if the existence of forcing is probable. Thus, application of the *per se* rule focuses on the probability of anticompetitive consequences. . . .
>
> "For example, if the Government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power. *United States* v. *Loew's Inc.*, 371 U. S., at 45–47. Any effort to enlarge the scope of the patent monopoly by using the market power it confers to restrain competition in the market for a second product will undermine competition on the merits in that second market. Thus, the sale or lease of a patented item on condition that the buyer make all his purchases of a separate tied product from the patentee is unlawful." *Id.*, at 13–16 (footnote omitted).

Notably, nothing in our opinion suggested a rebuttable presumption of market power applicable to tying arrangements involving a patent on the tying good. See *infra*, at 44; cf. 396 F. 3d, at 1352. Instead, it described the rule that a contract to sell a patented product on condition that the purchaser buy unpatented goods exclusively from the patentee is a *per se* violation of § 1 of the Sherman Act.

Justice O'Connor wrote separately in *Jefferson Parish*, concurring in the judgment on the ground that the case did not involve a true tying arrangement because, in her view, surgical services and anesthesia were not separate products. 466 U. S., at 43. In her opinion, she questioned not only the propriety of treating any tying arrangement as a *per se* violation of the Sherman Act, *id.*, at 35, but also the validity of the presumption that a patent always gives the patentee significant market power, observing that the presumption was actually a product of our patent misuse cases rather than our antitrust jurisprudence, *id.*, at 37–38, n. 7. It is that presumption, a vestige of the Court's historical distrust of tying arrangements, that we address squarely today.

## III

Justice O'Connor was, of course, correct in her assertion that the presumption that a patent confers market power arose outside the antitrust context as part of the patent misuse doctrine. That doctrine had its origins in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502 (1917), which found no support in the patent laws for the proposition that a patentee may "prescribe by notice attached to a patented machine the conditions of its use and the supplies which must be used in the operation of it, under pain of infringement of the patent," *id.*, at 509. Although *Motion Picture Patents Co.* simply narrowed the scope of possible patent infringement claims, it formed the basis for the Court's subsequent decisions creating a patent misuse defense to infringement claims when a patentee uses its patent "as the effective means of restraining competition with its sale of an unpatented article." *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488, 490 (1942); see also, *e. g., Carbice Corp. of America* v. *American Patents Development Corp.*, 283 U. S. 27, 31 (1931).

Without any analysis of actual market conditions, these patent misuse decisions assumed that, by tying the purchase of unpatented goods to the sale of the patented good, the patentee was "restraining competition," *Morton Salt*, 314 U. S., at 490, or "secur[ing] a limited monopoly of an unpatented material," *Mercoid*, 320 U. S., at 664; see also *Carbice*, 283 U. S., at 31–32. In other words, these decisions presumed "[t]he requisite economic power" over the tying product such that the patentee could "extend [its] economic control to unpatented products." *Loew's*, 371 U. S., at 45–46.

The presumption that a patent confers market power migrated from patent law to antitrust law in *International*

*Salt Co.* v. *United States,* 332 U. S. 392 (1947). In that case, we affirmed a District Court decision holding that leases of patented machines requiring the lessees to use the defendant's unpatented salt products violated § 1 of the Sherman Act and § 3 of the Clayton Act as a matter of law. *Id.,* at 396. Although the Court's opinion does not discuss market power or the patent misuse doctrine, it assumes that "[t]he volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious." *Ibid.*

The assumption that tying contracts "ten[d] . . . to accomplishment of monopoly" can be traced to the Government's brief in *International Salt,* which relied heavily on our earlier patent misuse decision in *Morton Salt.* The Government described *Morton Salt* as "present[ing] a factual situation almost identical with the instant case," and it asserted that "although the Court in that case did not find it necessary to decide whether the antitrust laws were violated, its language, its reasoning, and its citations indicate that the policy underlying the decision was the same as that of the Sherman Act." Brief for United States in *International Salt Co.* v. *United States,* O. T. 1947, No. 46, p. 19 (United States Brief). Building on its assertion that *International Salt* was logically indistinguishable from *Morton Salt,* the Government argued that this Court should place tying arrangements involving patented products in the category of *per se* violations of the Sherman Act. United States Brief 26–33.

Our opinion in *International Salt* clearly shows that we accepted the Government's invitation to import the presumption of market power in a patented product into our antitrust jurisprudence. While we cited *Morton Salt* only for the narrower proposition that the defendant's patents did not confer any right to restrain competition in unpatented salt or afford the defendant any immunity from the antitrust laws, *International Salt,* 332 U. S., at 395–396, given the fact that the defendant was selling its unpatented salt at competitive prices, *id.*, at 396–397, the rule adopted in *International Salt* necessarily accepted the Government's submission that the earlier patent misuse cases supported the broader proposition "that this type of restraint is unlawful on its face under the Sherman Act," United States Brief 12.

Indeed, later in the same Term we cited *International Salt* for the proposition that the license of "a patented device on condition that unpatented materials be employed in conjunction with the patented device" is an example of a restraint that is "illegal *per se.*" *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 522–523, and n. 22 (1948). And in subsequent cases we have repeatedly grounded the presumption of market power over a patented device in *International Salt.* See, *e. g., Loew's*, 371 U. S., at 45–46; *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 608 (1953); *Standard Oil Co.*, 337 U. S., at 304.

## IV

Although the patent misuse doctrine and our antitrust jurisprudence became intertwined in *International Salt*, subsequent events initiated their untwining. This process has ultimately led to today's reexamination of the presumption of *per se* illegality of a tying arrangement involving a patented product, the first case since 1947 in which we have granted review to consider the presumption's continuing validity.

Three years before we decided *International Salt*, this Court had expanded the scope of the patent misuse doctrine to include not only supplies or materials used by a patented device, but also tying arrangements involving a combination patent and "unpatented material or [a] device [that] is itself an integral part of the structure embodying the patent." *Mercoid*, 320 U. S., at 665; see also *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U. S. 176, 188–198 (1980) (describing in detail *Mercoid* and the cases leading up to it). In reaching this conclusion, the Court explained that it could see "no difference in principle" between cases involving elements essential to the inventive character of the patent and elements peripheral to it; both, in the Court's view, were attempts to "expan[d] the patent beyond the legitimate scope of its monopoly." *Mercoid*, 320 U. S., at 665.

Shortly thereafter, Congress codified the patent laws for the first time. See 66 Stat. 792, codified at 35 U. S. C. §1 *et seq.* (2000 ed. and Supp. III). At least partly in response to our *Mercoid* decision, Congress included a provision in its codification that excluded some conduct, such as a tying arrangement involving the sale of a patented product tied to an "essential" or "nonstaple" product that has no use except as part of the patented product or method, from the scope of the patent misuse doctrine. §271(d); see also *Dawson*, 448 U. S., at 214. Thus, at the same time that our antitrust jurisprudence continued to rely on the assumption that "tying arrangements generally serve no legitimate business purpose," *Fortner I*, 394 U. S., at 503, Congress began chipping away at the assumption in the patent misuse context from whence it came.

It is Congress' most recent narrowing of the patent misuse defense, however, that is directly relevant to this case. Four years after our decision in *Jefferson Parish* repeated the patent-equals-market-power presumption, 466 U. S., at 16, Congress amended the Patent Code to eliminate that presumption in the patent misuse context, 102 Stat. 4676. The relevant provision reads:

> "(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: . . . (5) conditioned the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, *unless, in view of the circumstances, the patent owner has*

> *market power in the relevant market for the patent or patented product on which the license or sale is conditioned.*" 35 U. S. C. §271(d)(5) (emphasis added).

The italicized clause makes it clear that Congress did not intend the mere existence of a patent to constitute the requisite "market power." Indeed, fairly read, it provides that without proof that Trident had market power in the relevant market, its conduct at issue in this case was neither "misuse" nor an "illegal extension of the patent right."

While the 1988 amendment does not expressly refer to the antitrust laws, it certainly invites a reappraisal of the *per se* rule announced in *International Salt*.[3] A rule denying a patentee the right to enjoin an infringer is significantly less severe than a rule that makes the conduct at issue a federal crime punishable by up to 10 years in prison. See 15 U. S. C. §1. It would be absurd to assume that Congress intended to provide that the use of a patent that merited punishment as a felony would not constitute "misuse." Moreover, given the fact that the patent misuse doctrine provided the basis for the market power presumption, it would be anomalous to preserve the presumption in antitrust after Congress has eliminated its foundation. Cf. 10 P. Areeda, H. Hovenkamp, & E. Elhauge, Antitrust Law ¶1737c (2d ed. 2004) (hereinafter Areeda).

After considering the congressional judgment reflected in the 1988 amendment, we conclude that tying arrangements involving patented products should be evaluated under the standards applied in cases like *Fortner II* and *Jefferson Parish* rather than under the *per se* rule applied in *Morton Salt* and *Loew's*. While some such arrangements are still unlawful, such as those that are the product of a true monopoly or a marketwide conspiracy, see, *e. g., United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 145–146 (1948), that conclusion must be supported by proof of power in the relevant market rather than by a mere presumption thereof.[4]

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[3] While our opinions have made clear that such an invitation is not necessary with respect to cases arising under the Sherman Act, see *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997), it is certainly sufficient to warrant reevaluation of our precedent, *id.*, at 21 ("[T]his Court has reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question").

## V

Rather than arguing that we should retain the rule of *per se* illegality, respondent contends that we should endorse a rebuttable presumption that patentees possess market power when they condition the purchase of the patented product on an agreement to buy unpatented goods exclusively from the patentee. Cf. *supra*, at 37–38. Respondent recognizes that a large number of valid patents have little, if any, commercial significance, but submits that those that are used to impose tying arrangements on unwilling purchasers likely do exert significant market power. Hence, in respondent's view, the presumption would have no impact on patents of only slight value and would be justified, subject to being rebutted by evidence offered by the patentee, in cases in which the patent has sufficient value to enable the patentee to insist on acceptance of the tie.

Respondent also offers a narrower alternative, suggesting that we differentiate between tying arrangements involving the simultaneous purchase of two products that are arguably two components of a single product—such as the provision of surgical services and anesthesiology in the same operation, *Jefferson Parish,* 466 U. S., at 43 (O'Connor, J., concurring in judgment), or the licensing of one copyrighted film on condition that the licensee take a package of several films in the same transaction, *Loew's,* 371 U. S. 38—and a tying arrangement involving the purchase of unpatented goods over a period of time, a so-called "requirements tie." See also Brief for Barry Nalebuff et al. as *Amici Curiae.* According to respondent, we should recognize a presumption of market power when faced with the latter type of arrangements because they provide a means for charging large volume purchasers a higher royalty for use of the patent than small purchasers must pay, a form of discrimination that "is strong evidence of market power." Brief for Respondent 27; see generally *Jefferson Parish,* 466 U. S., at 15, n. 23 (discussing price discrimination of this sort and citing sources).

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[4] Our imposition of this requirement accords with the vast majority of academic literature on the subject. See, *e. g.*, 10 Areeda ¶ 1737a ("[T]here is no economic basis for inferring any amount of market power from the mere fact that the defendant holds a valid patent"); Burchfiel, Patent Misuse and Antitrust Reform: "Blessed be the Tie?" 4 Harv. J. L. & Tech. 1, 57, and n. 340 (1991) (noting that the market power presumption has been extensively criticized and citing sources); 1 H. Hovenkamp, M. Janis, & M. Lemley, IP and Antitrust § 4.2a (2005 Supp.) ("[C]overage of one's product with an intellectual property right does not confer a monopoly"); W. Landes & R. Posner, The Economic Structure of Intellectual Property Law 374 (2003) (hereinafter Landes & Posner).

The opinion that imported the "patent equals market power" presumption into our antitrust jurisprudence, however, provides no support for respondent's proposed alternative. In *International Salt,* it was the existence of the patent on the tying product, rather than the use of a requirements tie, that led the Court to presume market power. 332 U. S., at 395 ("The appellant's patents confer a limited monopoly of the invention they reward"). Moreover, the requirements tie in that case did not involve any price discrimination between large volume and small volume purchasers or evidence of noncompetitive pricing. Instead, the leases at issue provided that if any competitor offered salt, the tied product, at a lower price, "the lessee should be free to buy in the open market, unless appellant would furnish the salt at an equal price." *Id.,* at 396.

As we have already noted, the vast majority of academic literature recognizes that a patent does not necessarily confer market power. See n. 4, *supra.* Similarly, while price discrimination may provide evidence of market power, particularly if buttressed by evidence that the patentee has charged an above-market price for the tied package, see, *e. g.*, 10 Areeda ¶ 1769c, it is generally recognized that it also occurs in fully competitive markets, see, *e. g.*, Baumol & Swanson, The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power, 70 Antitrust L. J. 661, 666 (2003); 9 Areeda ¶ 1711; Landes & Posner 374–375. We are not persuaded that the combination of these two factors should give rise to a presumption of market power when neither is sufficient to do so standing alone. Rather, the lesson to be learned from *International Salt* and the academic commentary is the same: Many tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market. For this reason, we reject both respondent's proposed rebuttable presumption and their narrower alternative.

It is no doubt the virtual consensus among economists that has persuaded the enforcement agencies to reject the position that the Government took when it supported the *per se* rule that the Court adopted in the 1940's. See *supra*, at 39. In antitrust guidelines issued jointly by the Department of Justice and the Federal Trade Commission in 1995, the enforcement agencies stated that in the exercise of their prosecutorial discretion they "will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner." U. S. Dept. of Justice and FTC, Antitrust Guidelines for the Licensing of Intellectual Property § 2.2 (Apr. 6, 1995), http://www.usdoj.gov/atr/public/guidelines/0558.pdf (as visited Feb. 24, 2006, and available in Clerk of Court's case file). While that choice is not binding on the Court, it would be unusual for the Judiciary to replace the normal rule of lenity that is applied in criminal cases with a rule of severity for a special category of antitrust cases.

Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee.

Today, we reach the same conclusion, and therefore hold that, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.

## VI

In this case, respondent reasonably relied on our prior opinions in moving for summary judgment without offering evidence defining the relevant market or proving that petitioners possess power within it. When the case returns to the District Court, respondent should therefore be given a fair opportunity to develop and introduce evidence on that issue, as well as any other issues that are relevant to its remaining § 1 claims. Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE ALITO took no part in the consideration or decision of this case.

# RUMSFELD, SECRETARY OF DEFENSE, ET AL. *v.* FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04–1152. Argued December 6, 2005—Decided March 6, 2006

Respondent Forum for Academic and Institutional Rights, Inc. (FAIR), is an association of law schools and law faculties, whose members have policies opposing discrimination based on, *inter alia,* sexual orientation. They would like to restrict military recruiting on their campuses because they object to the Government's policy on homosexuals in the military, but the Solomon Amendment—which provides that educational institutions denying military recruiters access equal to that provided other recruiters will lose certain federal funds—forces them to choose between enforcing their nondiscrimination policy against military recruiters and continuing to receive those funds. In 2003, FAIR sought a preliminary injunction against enforcement of an earlier version of the Solomon Amendment, arguing that forced inclusion and equal treatment of military recruiters violated its members' First Amendment freedoms of speech and association. Denying relief on the ground that FAIR had not established a likelihood of success on the merits, the District Court concluded that recruiting is conduct, not speech, and thus Congress could regulate any expressive aspect of the military's conduct under *United States* v. *O'Brien,* 391 U. S. 367. The District Court, however, questioned the Department of Defense (DOD) interpretation of the Solomon Amendment, under which law schools must provide recruiters access at least equal to that provided other recruiters. Congress responded to this concern by codifying the DOD's policy. Reversing the District Court's judgment, the Third Circuit concluded that the amended Solomon Amendment violates the unconstitutional conditions doctrine by forcing a law school to choose between surrendering First Amendment rights and losing federal funding for its university. The court did not think that *O'Brien* applied, but nonetheless determined that, if the activities were expressive conduct rather than speech, the Solomon Amendment was also unconstitutional under that decision.

*Held:* Because Congress could require law schools to provide equal access to military recruiters without violating the schools' freedoms of speech and association, the Third Circuit erred in holding that the Solomon Amendment likely violates the First Amendment. Pp. 55–70.

1. The Solomon Amendment should be read the way both the Government and FAIR interpret it: In order for a law school and its university to receive federal funding, the law school must offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access. Contrary to the argument of *amici* law professors, a school excluding military recruiters could not comply with the Solomon Amendment by also excluding any other recruiter that violates its nondiscrimination policy. The Secretary of Defense must compare the military's "access to campuses" and "to students" to "the access to campuses and to students that is provided to any other employer." 10 U. S. C. § 983. The statute does not focus on the content of a school's recruiting policy, but on the result achieved by the policy. Applying the same policy to all recruiters does not comply with the statute if it results in a greater level of access for other recruiters than for the military. This interpretation is supported by the text of the statute and is necessary to give effect to the Solomon Amendment's recent revision. Pp. 55–58.

2. Under the Solomon Amendment, a university must allow equal access for military recruiters in order to receive certain federal funds. Although there are limits on Congress' ability to condition the receipt of funds, see, *e. g., United States* v. *American Library Assn., Inc.,* 539 U. S. 194, 210, a funding condition cannot be unconstitutional if it could be constitutionally imposed directly. Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds. Pp. 58–70.

(a) As a general matter, the Solomon Amendment regulates conduct, not speech. Nevertheless, the Court of Appeals concluded that the statute violates law schools' freedom of speech in a number of ways. First, the law schools must provide military recruiters with some assistance clearly involving speech, such as sending e-mails and distributing flyers, if they provide such services to other recruiters. This speech is subject to First Amendment scrutiny, but the compelled speech here is plainly incidental to the statute's regulation of conduct. Compelling a law school that sends e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance to the flag, *West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624, or forcing a Jehovah's Witness to display a particular motto on his license plate, *Wooley* v. *Maynard,* 430 U. S. 705, and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.

Second, that military recruiters are, to some extent, speaking while on campus does not mean that the Solomon Amendment unconstitutionally requires law schools to accommodate the military's message by including those recruiters in interviews and recruiting receptions. This Court has found compelled-speech violations where the complaining speaker's own message was affected by the speech it was forced to accommodate. See, *e. g.*, *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 566. Here, however, the schools are not speaking when they host interviews and recruiting receptions. They facilitate recruiting to assist their students in obtaining jobs. Thus, a law school's recruiting services lack the expressive quality of, for example, the parade in *Hurley*. Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what they may say about the military's policies.

Third, the expressive nature of the conduct regulated by the Solomon Amendment does not bring that conduct within the First Amendment's protection. Unlike flag burning, see *Texas* v. *Johnson*, 491 U. S. 397, the conduct here is not so inherently expressive that it warrants protection under *O'Brien*. Before adoption of the Solomon Amendment's equal access requirement, law schools expressed their disagreement with the military by treating military recruiters differently from other recruiters. These actions were expressive not because of the conduct but because of the speech that accompanied that conduct. Moreover, even if the Solomon Amendment were regarded as regulating expressive conduct, it would be constitutional under *O'Brien*. Pp. 58–68.

(b) The Solomon Amendment also does not violate the law schools' freedom of expressive association. Unlike *Boy Scouts of America* v. *Dale*, 530 U. S. 640, where the Boy Scouts' freedom of expressive association was violated when a state law required the organization to accept a homosexual scoutmaster, the statute here does not force a law school "'to accept members it does not desire,'" *id.*, at 648. Law schools "associate" with military recruiters in the sense that they interact with them, but recruiters are not part of the school. They are outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association. The freedom of expressive association protects more than a group's membership decisions, reaching activities that affect a group's ability to express its message by making group membership less attractive. But the Solomon Amendment has no similar effect on a law school's associational rights. Students and faculty are free to associate to voice their disapproval of the military's message; nothing about the statute affects the composition of the group by making membership less desirable. Pp. 68–70.

390 F. 3d 219, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which all other Members joined, except ALITO, J., who took no part in the consideration or decision of the case.

*Solicitor General Clement* argued the cause for petitioners. With him on the brief were *Assistant Attorney General Keisler, Deputy Solicitor General Kneedler, Deputy Assistant Attorney General Katsas, Irving L. Gornstein,* and *Douglas N. Letter.*

*E. Joshua Rosenkranz* argued the cause for respondents. With him on the brief were *Sharon E. Frase* and *Warrington S. Parker III.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Greg Abbott,* Attorney General of Texas, *R. Ted Cruz,* Solicitor General, *Barry R. McBee,* First Assistant Attorney General, *Edward D. Burbach,* Deputy Attorney General, and *Joel L. Thollander* and *Adam W. Aston,* Assistant Solicitors General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *John W. Suthers* of Colorado, *M. Jane Brady* of Delaware, *Charles J. Crist, Jr.,* of Florida, *Steve Carter* of Indiana, *Phill Kline* of Kansas, *Michael A. Cox* of Michigan, *Lawrence E. Long* of South Dakota, *Mark L. Shurtleff* of Utah, and *Darrell V. McGraw, Jr.,* of West Virginia; for the American Civil Rights Union by *Peter Ferrara;* for the American Legion by *Robert P. Parker* and *Philip B. Onderdonk, Jr.;* for the Boy Scouts of America by *George A. Davidson, Carla A. Kerr, Scott H. Christensen,* and *David K. Park;* for the Center for Individual Rights et al. by *Gerald Walpin;* for the Christian Legal Society et al. by *Gregory S. Baylor* and *Steven H. Aden;* for the Claremont Institute Center for Constitutional Jurisprudence by *John C. Eastman* and *Edwin Meese III;* for the Eagle Forum Education & Legal Defense Fund by *Andrew L. Schlafly;* for the Judge Advocates Association by *Gregory M. Huckabee* and *Brett D. Barkey;* for Law Professors et al. by *Andrew G. McBride, William S. Consovoy, Daniel Polsby,* and *Joseph Zengerle;* for the National Legal Foundation by *Barry C. Hodge;* for Charles S. Abbot et al. by *Martin S. Kaufman, Joe R. Reeder, Philip R. Sellinger,* and *John P. Einwechter;* and for Congressman Richard Pombo et al. by *William Perry Pendley* and *Joseph F. Becker.*

Briefs of *amici curiae* urging affirmance were filed for the American Association of University Professors by *Kathleen M. Sullivan, Donna R.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

When law schools began restricting the access of military recruiters to their students because of disagreement with the Government's policy on homosexuals in the military, Congress responded by enacting the Solomon Amendment. See 10 U. S. C. § 983 (2000 ed. and Supp. IV). That provision specifies that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds. The law schools responded by suing, alleging that the Solomon Amendment infringed their First Amendment freedoms of speech and association. The District Court disagreed but was reversed by a divided panel of the Court of Appeals for the Third Circuit, which ordered the District Court to enter a preliminary injunction against enforcement of the Solomon Amendment. We granted certiorari.

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*Euben, Ann D. Springer,* and *David M. Rabban;* for the American Civil Liberties Union et al. by *Kenneth Y. Choe, Steven R. Shapiro, Matthew A. Coles,* and *James D. Esseks;* for the Association of American Law Schools by *Paul M. Smith, William M. Hohengarten,* and *Daniel Mach;* for Bay Area Lawyers for Individual Freedom et al. by *Beth S. Brinkmann, Seth M. Galanter,* and *Ruth N. Borenstein;* for the Cato Institute by *Gregory S. Coleman;* for Columbia University et al. by *Seth P. Waxman, Randolph D. Moss, James J. Mingle, Ada Meloy,* and *Wendy S. White;* for NALP (the National Association for Law Placement) et al. by *Sam Heldman* and *Hilary E. Ball;* for the National Lawyers Guild by *Zachary Wolfe;* for the National Lesbian and Gay Law Association et al. by *Jonathan L. Hafetz* and *Lawrence S. Lustberg;* for the Servicemembers Legal Defense Network by *Linda T. Coberly, Tyler M. Paetkau, Sharra E. Greer, Kathi S. Westcott,* and *Gene C. Schaerr;* for the Student/Faculty Alliance for Military Equality by *Carmine D. Boccuzzi, Jr.;* for William Alford et al. by *Walter Dellinger* and *Pamela Harris;* for Robert A. Burt et al. by *Paul M. Dodyk* and *David N. Rosen;* and for 56 Columbia Law School Faculty Members by *Jonathan D. Schiller* and *David A. Barrett.*

*John H. Findley* and *Harold E. Johnson* filed a brief for the Pacific Legal Foundation as *amicus curiae.*

## I

Respondent Forum for Academic and Institutional Rights, Inc. (FAIR), is an association of law schools and law faculties. App. 5. Its declared mission is "to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education." *Id.*, at 6. FAIR members have adopted policies expressing their opposition to discrimination based on, among other factors, sexual orientation. *Id.*, at 18. They would like to restrict military recruiting on their campuses because they object to the policy Congress has adopted with respect to homosexuals in the military. See 10 U. S. C. § 654.[1] The Solomon Amendment, however, forces institutions to choose between enforcing their nondiscrimination policy against military recruiters in this way and continuing to receive specified federal funding.

In 2003, FAIR sought a preliminary injunction against enforcement of the Solomon Amendment, which at that time—it has since been amended—prevented the Department of Defense (DOD) from providing specified federal funds to any institution of higher education "that either prohibits, or in effect prevents" military recruiters "from gaining entry to campuses." § 983(b).[2] FAIR considered the DOD's interpretation of this provision particularly objectionable. Although the statute required only "entry to campuses," the Government—after the terrorist attacks on September 11, 2001—adopted an informal policy of "'requir[ing] universities to provide military recruiters access to students equal in quality and scope to that provided to other recruiters.'" 291 F. Supp. 2d 269, 283 (NJ 2003). Prior to the adoption of this policy, some law schools sought to promote their nondiscrimination policies while still complying with the Solomon Amendment by having military recruiters interview on the undergraduate campus. *Id.*, at 282. But under the equal access policy, military recruiters had to be permitted to interview at the law schools, if other recruiters did so.

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[1] Under this policy, a person generally may not serve in the Armed Forces if he has engaged in homosexual acts, stated that he is a homosexual, or married a person of the same sex. Respondents do not challenge that policy in this litigation.

[2] The complaint named numerous other plaintiffs as well. The District Court concluded that each plaintiff had standing to bring this suit. 291 F. Supp. 2d 269, 284–296 (NJ 2003). The Court of Appeals for the Third Circuit agreed with the District Court that FAIR had associational standing to bring this suit on behalf of its members. 390 F. 3d 219, 228, n. 7 (2004). The Court of Appeals did not determine whether the other plaintiffs have standing because the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement. *Ibid.* (citing *Bowsher* v. *Synar*, 478 U. S. 714, 721 (1986)). Because we also agree that FAIR has standing, we similarly limit our discussion to FAIR.

FAIR argued that this forced inclusion and equal treatment of military recruiters violated the law schools' First Amendment freedoms of speech and association. According to FAIR, the Solomon Amendment was unconstitutional because it forced law schools to choose between exercising their First Amendment right to decide whether to disseminate or accommodate a military recruiter's message, and ensuring the availability of federal funding for their universities.

The District Court denied the preliminary injunction on the ground that FAIR had failed to establish a likelihood of success on the merits of its First Amendment claims. The District Court held that inclusion "of an unwanted periodic visitor" did not "significantly affect the law schools' ability to express their particular message or viewpoint." *Id.*, at 304. The District Court based its decision in large part on the determination that recruiting is conduct and not speech, concluding that any expressive aspect of recruiting "is entirely ancillary to its dominant economic purpose." *Id.*, at 308. The District Court held that Congress could regulate this expressive aspect of the conduct under the test set forth in *United States* v. *O'Brien*, 391 U. S. 367 (1968). 291 F. Supp. 2d, at 311–314.

In rejecting FAIR's constitutional claims, the District Court disagreed with "the DOD's proposed interpretation that the statute requires law schools to 'provide military recruiters access to students that is at least equal in quality and scope to the access provided other potential employers.'" *Id.*, at 321. In response to the District Court's concerns, Congress codified the DOD's informal policy. See H. R. Rep. No. 108–443, pt. 1, p. 6 (2004) (discussing the District Court's decision in this case and stating that the amended statute "would address the court's opinion and codify the equal access standard"). The Solomon Amendment now prevents an institution from receiving certain federal funding if it prohibits military recruiters "from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U. S. C. § 983(b) (2000 ed., Supp. IV).[3]

FAIR appealed the District Court's judgment, arguing that the recently amended Solomon Amendment was unconstitutional for the same reasons as the earlier version. A divided panel of the Court of Appeals for the Third Circuit agreed. 390 F. 3d 219 (2004). According to the Third Circuit, the Solomon Amendment violated the unconstitutional conditions doctrine because it forced a law school to choose between surrendering First Amendment rights and losing federal funding for its university. *Id.*, at 229–243. Unlike the District Court, the Court of Appeals did not think that the *O'Brien* analysis applied because the Solomon Amendment, in its view, regulated speech and not simply expressive conduct. 390 F. 3d, at 243–244. The Third Circuit nonetheless determined that if the regulated activities were properly treated as expressive conduct rather than speech, the Solomon Amendment was also unconstitutional under *O'Brien*. 390 F. 3d, at 244–246. As a result, the Court of Appeals reversed and remanded for the District Court to enter a preliminary injunction against enforcement of the Solomon Amendment. *Id.*, at 246. A dissenting judge would have applied *O'Brien* and affirmed. 390 F. 3d, at 260–262 (opinion of Aldisert, J.).

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[3] The federal funds covered by the Solomon Amendment are specified at 10 U. S. C. § 983(d)(1) (2000 ed., Supp. IV) and include funding from the Departments of Defense, Homeland Security, Transportation, Labor, Health and Human Services, and Education, and the Central Intelligence Agency and the National Nuclear Security Administration of the Department of Energy. Funds provided for student financial assistance are not covered. § 983(d)(2). The loss of funding applies not only to the particular school denying access but universitywide. § 983(b).

We granted certiorari. 544 U. S. 1017 (2005).

## II

The Solomon Amendment denies federal funding to an institution of higher education that "has a policy or practice . . . that either prohibits, or in effect prevents" the military "from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U. S. C. § 983(b) (2000 ed., Supp. IV). The statute provides an exception for an institution with "a longstanding policy of pacifism based on historical religious affiliation." § 983(c)(2) (2000 ed.). The Government and FAIR agree on what this statute requires: In order for a law school and its university to receive federal funding, the law school must offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access.

Certain law professors participating as *amici*, however, argue that the Government and FAIR misinterpret the statute. See Brief for William Alford et al. as *Amici Curiae*

10–18; Brief for 56 Columbia Law School Faculty Members as *Amici Curiae* 6–15. According to these *amici,* the Solomon Amendment's equal access requirement is satisfied when an institution applies to military recruiters the same policy it applies to all other recruiters. On this reading, a school excluding military recruiters would comply with the Solomon Amendment so long as it also excluded any other employer that violates its nondiscrimination policy.

In its reply brief, the Government claims that this question is not before the Court because it was neither included in the questions presented nor raised by FAIR. Reply Brief for Petitioners 20, n. 4. But our review may, in our discretion, encompass questions " 'fairly included' " within the question presented, *Yee* v. *Escondido,* 503 U. S. 519, 535 (1992), and there can be little doubt that granting certiorari to determine whether a statute is constitutional fairly includes the question of what that statute says. Nor must we accept an interpretation of a statute simply because it is agreed to by the parties. After all, "[o]ur task is to construe what Congress has enacted." *Duncan* v. *Walker,* 533 U. S. 167, 172 (2001). We think it appropriate in the present case to consider whether institutions can comply with the Solomon Amendment by applying a general nondiscrimination policy to exclude military recruiters.

We conclude that they cannot and that the Government and FAIR correctly interpret the Solomon Amendment. The statute requires the Secretary of Defense to compare the military's "access to campuses" and "access to students" to "the access to campuses and to students that is provided to *any other employer.*" (Emphasis added.) The statute does not call for an inquiry into why or how the "other employer" secured its access. Under *amici's* reading, a military recruiter has the same "access" to campuses and students as, say, a law firm when the law firm is permitted on campus to interview students and the military is not. We do not think that the military recruiter has received equal "access" in this situation—regardless of whether the disparate treatment is attributable to the military's failure to comply with the school's nondiscrimination policy.

The Solomon Amendment does not focus on the *content* of a school's recruiting policy, as the *amici* would have it. Instead, it looks to the *result* achieved by the policy and compares the "access . . . provided" military recruiters to that provided other recruiters. Applying the same policy to all recruiters is therefore insufficient to comply with the statute if it results in a greater level of access for other recruiters than for the military. Law schools must ensure that their recruiting policy operates in such a way that military recruiters are given access to students at least equal to that "*provided* to any other employer." (Emphasis added.)

Not only does the text support this view, but this interpretation is necessary to give effect to the Solomon Amendment's recent revision. Under the prior version, the statute required "entry" without specifying how military recruiters should be treated once on campus. 10 U. S. C. § 983(b) (2000 ed.). The District Court thought that the DOD policy, which required equal access to students once recruiters were on campus, was unwarranted based on the text of the statute. 291 F. Supp. 2d, at 321. Congress responded directly to this decision by codifying the DOD policy. Under *amici's* interpretation, this legislative change had no effect—law schools could still restrict military access, so long as they do so under a generally applicable nondiscrimination policy. Worse yet, the legislative change made it *easier* for schools to keep military recruiters out altogether: Under the prior version, simple access could not be denied, but under the amended version, access could be denied altogether, so long as a nonmilitary recruiter would also be denied access. That is rather clearly *not* what Congress had in mind in codifying the DOD policy. We refuse to interpret the Solomon

Amendment in a way that negates its recent revision, and indeed would render it a largely meaningless exercise.

We therefore read the Solomon Amendment the way both the Government and FAIR interpret it. It is insufficient for a law school to treat the military as it treats all other employers who violate its nondiscrimination policy. Under the statute, military recruiters must be given the same access as recruiters who comply with the policy.

## III

The Constitution grants Congress the power to "provide for the common Defence," "[t]o raise and support Armies," and "[t]o provide and maintain a Navy." Art. I, §8, cls. 1, 12–13. Congress' power in this area "is broad and sweeping," *O'Brien*, 391 U. S., at 377, and there is no dispute in this case that it includes the authority to require campus access for military recruiters. That is, of course, unless Congress exceeds constitutional limitations on its power in enacting such legislation. See *Rostker* v. *Goldberg*, 453 U. S. 57, 67 (1981). But the fact that legislation that raises armies is subject to First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality; as we recognized in *Rostker*, "judicial deference . . . is at its apogee" when Congress legislates under its authority to raise and support armies. *Id.*, at 70.

Although Congress has broad authority to legislate on matters of military recruiting, it nonetheless chose to secure campus access for military recruiters indirectly, through its Spending Clause power. The Solomon Amendment gives universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds. Congress' decision to proceed indirectly does not reduce the deference given to Congress in the area of military affairs. Congress' choice to promote its goal by creating a funding condition deserves at least as deferential treatment as if Congress had imposed a mandate on universities.

Congress' power to regulate military recruiting under the Solomon Amendment is arguably greater because universities are free to decline the federal funds. In *Grove City College* v. *Bell,* 465 U. S. 555, 575–576 (1984), we rejected a private college's claim that conditioning federal funds on its compliance with Title IX of the Education Amendments of 1972 violated the First Amendment. We thought this argument "warrant[ed] only brief consideration" because "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." *Id.,* at 575. We concluded that no First Amendment violation had occurred—without reviewing the substance of the First Amendment claims—because Grove City could decline the Government's funds. *Id.,* at 575–576.

Other decisions, however, recognize a limit on Congress' ability to place conditions on the receipt of funds. We recently held that "'the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" *United States* v. *American Library Assn., Inc.,* 539 U. S. 194, 210 (2003) (quoting *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr,* 518 U. S. 668, 674 (1996) (some internal quotation marks omitted)). Under this principle, known as the unconstitutional conditions doctrine, the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students.

This case does not require us to determine when a condition placed on university funding goes beyond the "reasonable" choice offered in *Grove City* and becomes an unconstitutional condition. It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly. See *Speiser* v. *Randall,* 357 U. S. 513, 526 (1958). Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.

### A

The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds. See Tr. of Oral Arg. 25 (Solicitor General acknowledging that law schools "could put signs on the bulletin board next to the door, they could engage in speech, they could help organize student protests"). As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say.*

Nevertheless, the Third Circuit concluded that the Solomon Amendment violates law schools' freedom of speech in a number of ways. First, in assisting military recruiters, law schools provide some services, such as sending e-mails and distributing flyers, that clearly involve speech. The Court of Appeals held that in supplying these services law schools are unconstitutionally compelled to speak the Government's message. Second, military recruiters are, to some extent, speaking while they are on campus. The Court of Appeals held that, by forcing law schools to permit the military on campus to express its message, the Solomon Amendment unconstitutionally requires law schools to host or accommodate the military's speech. Third, although the Court of Appeals thought that the Solomon Amendment regulated speech, it held in the alternative that, if the statute regulates conduct, this conduct is expressive and regulating it unconstitutionally infringes law schools' right to engage in expressive conduct. We consider each issue in turn.[4]

### 1

Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say. In *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943), we held unconstitutional a state law requiring schoolchildren to recite the Pledge of Allegiance and to salute the flag. And in *Wooley* v. *Maynard*, 430 U. S. 705, 717 (1977), we held unconstitutional another that required New Hampshire motorists to display the state motto—"Live Free or Die"—on their license plates.

The Solomon Amendment does not require any similar expression by law schools. Nonetheless, recruiting assistance provided by the schools often includes elements of speech. For example, schools may send e-mails or post notices on bulletin boards on an employer's behalf. See, *e. g.*, App. 169–170; Brief for NALP (National Association for Law Placement) et al. as *Amici Curiae* 11. Law schools offering such services to other recruiters must also send e-mails and post notices on behalf of the military to comply with the Solomon Amendment. As FAIR points out, these compelled statements of fact ("The U. S. Army recruiter will meet interested students in Room 123 at 11 a.m."), like compelled statements of opinion, are subject to First Amendment scrutiny. See Brief for Respondents 25 (citing *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 797–798 (1988)).

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[4] The Court of Appeals also held that the Solomon Amendment violated the First Amendment because it compelled law schools to subsidize the Government's speech "by putting demands on the law schools' employees and resources." 390 F. 3d, at 240. We do not consider the law schools' assistance to raise the issue of subsidizing Government speech as that concept has been used in our cases. See *Johanns* v. *Livestock Marketing Assn.*, 544 U. S. 550, 559 (2005). The accommodations the law schools must provide to military recruiters are minimal, are not of a monetary nature, and are extended to all employers recruiting on campus, not just the Government. And in *Johanns*, which was decided after the Third Circuit's decision in this case, we noted that our previous compelled-subsidy cases involved subsidizing private speech, and we held that "[c]itizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech." *Id.*, at 562. The military recruiters' speech is clearly Government speech.

This sort of recruiting assistance, however, is a far cry from the compelled speech in *Barnette* and *Wooley*. The Solomon Amendment, unlike the laws at issue in those cases, does not dictate the content of the speech at all, which is only "compelled" if, and to the extent, the school provides such speech for other recruiters. There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse.

The compelled speech to which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct, and "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 502 (1949). Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading "White Applicants Only" hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct. See *R. A. V.* v. *St. Paul*, 505 U. S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct"). Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto "Live Free or Die," and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.

### 2

Our compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message. We have also in a number of instances limited the government's ability to force one speaker to host or accommodate another speaker's message. See *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 566 (1995) (state law cannot require a parade to include a group whose message the parade's organizer does not wish to send); *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 20–21 (1986) (plurality opinion); accord, *id.*, at 25 (Marshall, J., concurring in judgment) (state agency cannot require a utility company to include a third-party newsletter in its billing envelope); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 258 (1974) (right-of-reply statute violates editors' right to determine the content of their newspapers). Relying on these precedents, the Third Circuit concluded that the Solomon Amendment unconstitutionally compels law schools to accommodate the military's message "[b]y requiring schools to include military recruiters in the interviews and recruiting receptions the schools arrange." 390 F. 3d, at 240.

The compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate. The expressive nature of a parade was central to our holding in *Hurley*. 515 U. S., at 568 ("Parades are . . . a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches"). We concluded that because "every participating unit affects the message conveyed by the [parade's] private organizers," a law dictating that a particular group must be included in the parade "alter[s] the expressive content of th[e] parade." *Id.*, at 572–573. As a result, we held that the State's public accommodation law, as applied to a private parade, "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.*, at 573.

The compelled-speech violations in *Tornillo* and *Pacific Gas* also resulted from interference with a speaker's desired message. In *Tornillo*, we recognized that "the compelled printing of a reply . . . tak[es] up space that could be devoted to other material the newspaper may have preferred to print," 418 U. S., at 256, and therefore concluded that this right-of-reply statute infringed the newspaper editors' freedom of speech by altering the message the paper wished to express, *id.*, at 258. The same is true in *Pacific Gas.* There, the utility company regularly included its newsletter, which we concluded was protected speech, in its billing envelope. 475 U. S., at 8–9. Thus, when the state agency ordered the utility to send a third-party newsletter four times a year, it interfered with the utility's ability to communicate its own message in its newsletter. A plurality of the Court likened this to the situation in *Tornillo* and held that the forced inclusion of the other newsletter interfered with the utility's own message. 475 U. S., at 16–18.

In this case, accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions. Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs. A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.

The schools respond that if they treat military and nonmilitary recruiters alike in order to comply with the Solomon Amendment, they could be viewed as sending the message that they see nothing wrong with the military's policies, when they do. We rejected a similar argument in *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980). In that case, we upheld a state law requiring a shopping center owner to allow certain expressive activities by others on its property. We explained that there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to disassociate himself from those views and who was "not . . . being compelled to affirm [a] belief in any governmentally prescribed position or view." *Id.*, at 88.

The same is true here. Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies. We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy. *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 250 (1990) (plurality opinion); accord, *id.*, at 268 (Marshall, J., concurring in judgment); see also *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 841 (1995) (attribution concern "not a plausible fear"). Surely students have not lost that ability by the time they get to law school.

### 3

Having rejected the view that the Solomon Amendment impermissibly regulates *speech*, we must still consider whether the expressive nature of the *conduct* regulated by the statute brings that conduct within the First Amendment's protection. In *O'Brien*, we recognized that some forms of "'symbolic speech'" were deserving of First Amendment protection. 391 U. S., at 376. But we rejected the view that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Ibid.* Instead, we have extended First Amendment protection only to conduct that is inherently expressive. In *Texas* v. *Johnson,* 491 U. S. 397, 406 (1989), for example, we applied *O'Brien* and held that burning the American flag was sufficiently expressive to warrant First Amendment protection.

Unlike flag burning, the conduct regulated by the Solomon Amendment is not inherently expressive. Prior to the adoption of the Solomon Amendment's equal access requirement, law schools "expressed" their disagreement with the military by treating military recruiters differently from other recruiters. But these actions were expressive only because the law schools accompanied their conduct with speech explaining it. For example, the point of requiring military interviews to be conducted on the undergraduate campus is not "overwhelmingly apparent." *Johnson, supra,* at 406. An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.

The expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it. The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien.* If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into "speech" simply by talking about it. For instance, if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, we would have to apply *O'Brien* to determine whether the Tax Code violates the First Amendment. Neither *O'Brien* nor its progeny supports such a result.

Although the Third Circuit also concluded that *O'Brien* does not apply, it held in the alternative that the Solomon Amendment does not pass muster under *O'Brien* because the Government failed to produce evidence establishing that the Solomon Amendment was necessary and effective. 390 F. 3d, at 245. The Court of Appeals surmised that "the military has ample resources to recruit through alternative means," suggesting "loan repayment programs" and "television and radio advertisements." *Id.*, at 234–235. As a result, the Government—according to the Third Circuit—failed to establish that the statute's burden on speech is no greater than essential to furthering its interest in military recruiting. *Id.*, at 245.

We disagree with the Court of Appeals' reasoning and result. We have held that "an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States* v. *Albertini*, 472 U. S. 675, 689 (1985). The Solomon Amendment clearly satisfies this requirement. Military recruiting promotes the substantial Government interest in raising and supporting the Armed Forces—an objective that would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers. The Court of Appeals' proposed alternative methods of recruiting are beside the point. The issue is not whether other means of raising an army and providing for a navy might be adequate. See *id.*, at 689 (regulations are not "invalid simply because there is some imaginable alternative that might be less burdensome on speech"). That is a judgment for Congress, not the courts. See U. S. Const., Art. I, §8, cls. 12–13; *Rostker*, 453 U. S., at 64–65. It suffices that the means chosen by Congress add to the effectiveness of military recruitment. Accordingly, even if the Solomon Amendment were regarded as regulating expressive conduct, it would not violate the First Amendment under *O'Brien.*

## B

The Solomon Amendment does not violate law schools' freedom of speech, but the First Amendment's protection extends beyond the right to speak. We have recognized a First Amendment right to associate for the purpose of speaking, which we have termed a "right of expressive association." See, *e. g., Boy Scouts of America* v. *Dale,* 530 U. S. 640, 644 (2000). The reason we have extended First Amendment protection in this way is clear: The right to speak is often exercised most effectively by combining one's voice with the voices of others. See *Roberts* v. *United States Jaycees,* 468 U. S. 609, 622 (1984). If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect. *Ibid.*

FAIR argues that the Solomon Amendment violates law schools' freedom of expressive association. According to FAIR, law schools' ability to express their message that discrimination on the basis of sexual orientation is wrong is significantly affected by the presence of military recruiters on campus and the schools' obligation to assist them. Relying heavily on our decision in *Dale,* the Court of Appeals agreed. 390 F. 3d, at 230–235.

In *Dale,* we held that the Boy Scouts' freedom of expressive association was violated by New Jersey's public accommodations law, which required the organization to accept a homosexual as a scoutmaster. After determining that the Boy Scouts was an expressive association, that "the forced inclusion of Dale would significantly affect its expression," and that the State's interests did not justify this intrusion, we concluded that the Boy Scouts' First Amendment rights were violated. 530 U. S., at 655–659.

The Solomon Amendment, however, does not similarly affect a law school's associational rights. To comply with the statute, law schools must allow military recruiters on campus and assist them in whatever way the school chooses to assist other employers. Law schools therefore "associate" with military recruiters in the sense that they interact with them. But recruiters are not part of the law school. Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association. This distinction is critical. Unlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school "'to accept members it does not desire.'" *Id.*, at 648 (quoting *Roberts*, *supra*, at 623). The law schools *say* that allowing military recruiters equal access impairs their own expression by requiring them to associate with the recruiters, but just as saying conduct is undertaken for expressive purposes cannot make it symbolic speech, see *supra*, at 66, so too a speaker cannot "erect a shield" against laws requiring access "simply by asserting" that mere association "would impair its message." 530 U. S., at 653.

FAIR correctly notes that the freedom of expressive association protects more than just a group's membership decisions. For example, we have held laws unconstitutional that require disclosure of membership lists for groups seeking anonymity, *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U. S. 87, 101–102 (1982), or impose penalties or withhold benefits based on membership in a disfavored group, *Healy* v. *James*, 408 U. S. 169, 180–184 (1972). Although these laws did not directly interfere with an organization's composition, they made group membership less attractive, raising the same First Amendment concerns about affecting the group's ability to express its message.

The Solomon Amendment has no similar effect on a law school's associational rights. Students and faculty are free to associate to voice their disapproval of the military's message; nothing about the statute affects the composition of the group by making group membership less desirable. The Solomon Amendment therefore does not violate a law school's First Amendment rights. A military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message.

* * *

In this case, FAIR has attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect. The law schools object to having to treat military recruiters like other recruiters, but that regulation of conduct does not violate the First Amendment. To the extent that the Solomon Amendment incidentally affects expression, the law schools' effort to cast themselves as just like the schoolchildren in *Barnette*, the parade organizers in *Hurley*, and the Boy Scouts in *Dale* plainly overstates the expressive nature of their activity and the impact of the Solomon Amendment on it, while exaggerating the reach of our First Amendment precedents.

Because Congress could require law schools to provide equal access to military recruiters without violating the schools' freedoms of speech or association, the Court of Appeals erred in holding that the Solomon Amendment likely violates the First Amendment. We therefore reverse the judgment of the Third Circuit and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE ALITO took no part in the consideration or decision of this case.

# MERRILL LYNCH, PIERCE, FENNER & SMITH INC. *v.* DABIT

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 04–1371. Argued January 18, 2006—Decided March 21, 2006

Respondent Dabit filed a private securities fraud class action in federal court, invoking diversity jurisdiction to advance his state-law claims that petitioner, his former employer, fraudulently manipulated stock prices, causing him and other brokers and their clients to keep their overvalued securities. The District Court dismissed his amended complaint, finding his claims pre-empted by Title I of the Securities Litigation Uniform Standards Act of 1998 (SLUSA), which provides that no "covered class action" based on state law and alleging "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security" "may be maintained in any State or Federal court by any private party." 15 U. S. C. § 78bb(f)(1)(A). Vacating the judgment, the Second Circuit concluded that, to the extent the complaint alleged that brokers were fraudulently induced, not to sell or purchase, but to retain or delay selling, it fell outside SLUSA's pre-emptive scope.

*Held:* The background, text, and purpose of SLUSA's pre-emption provision demonstrate that SLUSA pre-empts state-law holder class-action claims of the kind Dabit alleges. Pp. 78–89.

(a) The magnitude of the federal interest in protecting the integrity and efficiency of the national securities market cannot be overstated. The Securities Act of 1933 and the Securities Exchange Act of 1934 (1934 Act) anchor federal regulation of vital elements of this Nation's economy. Securities and Exchange Commission (SEC) Rule 10b–5, which was promulgated pursuant to § 10(b) of the 1934 Act, is an important part of that regulatory scheme, and, like § 10(b), prohibits deception, misrepresentation, and fraud "in connection with the purchase or sale" of a security. When, in *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, this Court limited the Rule 10b–5 private right of action to plaintiffs who were themselves purchasers or sellers, it relied on the widespread recognition that suits by nonpurchasers and nonsellers present a special risk of vexatious litigation that could "frustrate or delay normal business activity," *id.,* at 740. Pp. 78–81.

(b) Similar policy considerations prompted Congress to adopt legislation (Reform Act) targeted at perceived abuses of class actions—*e. g.,* nuisance filings and vexatious discovery requests—but this effort prompted members of the plaintiffs' bar to avoid the federal forum altogether. To stem the shift of class actions from federal to state courts, Congress enacted SLUSA. Pp. 81–82.

(c) Both the class and the securities here are "covered" within SLUSA's meaning, and the complaint alleges misrepresentations and omissions of material facts. The only disputed issue is whether the alleged wrongdoing was "in connection with the purchase or sale" of securities. Dabit's narrow reading would pre-empt only those actions in which *Blue Chip Stamps'* purchaser-seller requirement is met. Insofar as that argument assumes that the *Blue Chip Stamps* rule stems from Rule 10b–5's text, it must be rejected, for the Court relied on "policy considerations" in adopting that limitation, and it purported to define the scope of a private right of action under Rule 10b–5, not to define "in connection with the purchase or sale." When this Court has sought to give meaning to that phrase in the § 10(b) and Rule 10b–5 context, it has broadly required that the alleged fraud "coincide" with a securities transaction, an interpretation that comports with the SEC's longstanding views. Congress can hardly have been unaware of this broad construction when it imported the phrase into SLUSA. Where judicial interpretations have settled a statutory provision's meaning, repeating the same language in a new statute indicates the intent to incorporate the judicial interpretations as well. That presumption is particularly apt here, because Congress not only used § 10(b)'s and Rule 10b–5's words, but used them in another provision appearing in the same statute as § 10(b). The presumption that Congress envisioned a broad construction also follows from the particular concerns that culminated in SLUSA's enactment, viz., preventing state private securities class-action suits from frustrating the Reform Act's objectives. A narrow construction also would give rise to wasteful, duplicative litigation in state and federal courts. The presumption that "Congress does not cavalierly pre-empt state-law causes of action," *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485, has less force here because SLUSA does not pre-empt any cause of action. It simply denies the use of the class-action device to vindicate certain claims. Moreover, tailored exceptions to SLUSA's pre-emptive command—for, *e. g.*, state agency enforcement proceedings—demonstrate that Congress did not act cavalierly. Finally, federal, not state, law has long been the principal vehicle for asserting class-action securities fraud claims. Pp. 82–88.

(d) Dabit's holder class action is distinguishable from a typical Rule 10b–5 class action only in that it is brought by holders rather than sellers or purchasers. That distinction is irrelevant for SLUSA pre-emption purposes. The plaintiffs' identity does not determine whether the complaint alleges the requisite fraud, and the alleged misconduct here—fraudulent manipulation of stock prices—unquestionably qualifies as a fraud "in connection with the purchase or sale" of securities as the phrase is defined in *SEC* v. *Zandford*, 535 U. S. 813, 820, and *United States* v. *O'Hagan*, 521 U. S. 642, 651. Pp. 88–89.

395 F. 3d 25, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except ALITO, J., who took no part in the consideration or decision of the case.

*Jay B. Kasner* argued the cause for petitioner. With him on the briefs were *Preeta D. Bansal, Edward J. Yodowitz, Scott D. Musoff,* and *Joanne Gaboriault.*

*Deputy Solicitor General Hungar* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Clement, Daryl Joseffer, Giovanni P. Prezioso, Jacob H. Stillman, Eric Summergrad, Susan S. McDonald,* and *Jeffrey T. Tao.*

*David C. Frederick* argued the cause for respondent. With him on the brief were *Priya R. Aiyar, William B. Federman, Stuart W. Emmons,* and *Clell I. Cunningham III.**

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Charles A. Rothfeld, Andrew J. Pincus, Stephen M. Shapiro, Timothy S. Bishop, Robin S. Conrad,* and *Amar D. Sarwal;* for the Investment Company Institute by *Theodore B. Olson* and *Mark A. Perry;* for Lord, Abbett & Co. et al. by *Charles Lee Eisen, Jeffrey B. Maletta,* and *Nicholas G. Terris;* for the Securities Industry Association et al. by *Carter G. Phillips* and *Richard D. Bernstein;* and for the Washington Legal Foundation by *Donald B. Verrilli, Jr., Ronald L. Marmer, C. John Koch, Daniel J. Popeo,* and *David Price.*

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Eliot Spitzer,* Attorney General of New York, *Caitlin J. Halligan,* Solicitor General, and *Mariya S. Treisman,* Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Bill Lockyer* of California, *Richard Blumenthal* of Connecticut, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Michael A. Cox* of Michigan, *Mike Hatch* of Minnesota, *Jim Hood* of Mississippi, *Mike McGrath* of Montana, *Peter C. Harvey* of New Jersey, *Patricia A. Madrid* of New Mexico, *Jim Petro* of Ohio, *W. A. Drew*

JUSTICE STEVENS delivered the opinion of the Court.

Title I of the Securities Litigation Uniform Standards Act of 1998 (SLUSA) provides that "[n]o covered class action" based on state law and alleging "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security" "may be maintained in any State or Federal court by any private party." § 101(b), 112 Stat. 3230 (codified at 15 U. S. C. § 78bb(f)(1)(A)). In this case the Second Circuit held that SLUSA only pre-empts state-law class-action claims brought by plaintiffs who have a private remedy under federal law. 395 F. 3d 25 (2005). A few months later, the Seventh Circuit ruled to the contrary, holding that the statute also pre-empts state-law class-action claims for which federal law provides no private remedy. *Kircher* v. *Putnam Funds Trust*, 403 F. 3d 478 (2005). The background, the text, and the purpose of SLUSA's pre-emption provision all support the broader interpretation adopted by the Seventh Circuit.

## I

Petitioner Merrill Lynch, Pierce, Fenner & Smith Inc. (Merrill Lynch) is an investment banking firm that offers research and brokerage services to investors. Suspicious that the firm's loyalties to its investment banking clients had produced biased investment advice, the New York attorney general in 2002 instituted a formal investigation into Merrill

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*Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Henry McMaster* of South Carolina, *William H. Sorrell* of Vermont, *Rob McKenna* of Washington, and *Peggy A. Lautenschlager* of Wisconsin; for IJG Investments et al. by *Ira Neil Richards;* for the National Association of Shareholder and Consumer Attorneys et al. by *Stewart M. Weltman, Kevin P. Roddy,* and *Deborah M. Zuckerman;* and for Phillip Goldstein et al. by *Robert L. King.*

*Steven B. Feirson* and *Nory Miller* filed a brief for Pacific Life Insurance Co. as *amicus curiae.*

Lynch's practices. The investigation sparked a number of private securities fraud actions, this one among them.[1]

Respondent, Shadi Dabit, is a former Merrill Lynch broker. He filed this class action in the United States District Court for the Western District of Oklahoma on behalf of himself and all other former or current brokers who, while employed by Merrill Lynch, purchased (for themselves and for their clients) certain stocks between December 1, 1999, and December 31, 2000. See App. 27a–46a. Rather than rely on the federal securities laws, Dabit invoked the District Court's diversity jurisdiction and advanced his claims under Oklahoma state law.

The gist of Dabit's complaint was that Merrill Lynch breached the fiduciary duty and covenant of good faith and fair dealing it owed its brokers by disseminating misleading research and thereby manipulating stock prices.[2] Dabit's theory was that Merrill Lynch used its misinformed brokers to enhance the prices of its investment banking clients' stocks: The research analysts, under management's direction, allegedly issued overly optimistic appraisals of the stocks' value; the brokers allegedly relied on the analysts' reports in advising their investor clients and in deciding whether or not to sell their own holdings; and the clients and brokers both continued to hold their stocks long beyond the point when, had the truth been known, they would have sold. The complaint further alleged that when the truth was actually revealed (around the time the New York attorney general instituted his investigation), the stocks' prices plummeted.

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[1] Merrill Lynch eventually settled its dispute with the New York attorney general.

[2] The complaint alleged, for example, that the prices of the subject stocks were "artificially inflated as a result of the manipulative efforts" of Merrill Lynch, and that Merrill Lynch, "acting as a central nerve center in the manipulation of various stocks . . . , perpetrated this stock manipulation through a variety of deceptive devices, artifices, and tactics that are the hallmarks of stock manipulation." App. 28a–29a.

Dabit asserted that Merrill Lynch's actions damaged the class members in two ways: The misrepresentations and manipulative tactics caused them to hold onto overvalued securities, and the brokers lost commission fees when their clients, now aware that they had made poor investments, took their business elsewhere.

In July 2002, Merrill Lynch moved to dismiss Dabit's complaint. It argued, first, that SLUSA pre-empted the action and, second, that the claims alleged were not cognizable under Oklahoma law. The District Court indicated that it was "not impressed by" the state-law argument, but agreed that the federal statute pre-empted at least some of Dabit's claims. *Id.*, at 49a–50a. The court noted that the complaint alleged both "claims and damages based on wrongfully-induced purchases" and "claims and damages based on wrongfully-induced holding." *Ibid.* While the "holding" claims, the court suggested, might not be pre-empted, the "purchasing" claims certainly were. The court dismissed the complaint with leave to amend to give Dabit the opportunity to untangle his "hopeless mélange of purchase-related and holding-related assertions." *Ibid.* (punctuation added).

Dabit promptly filed an amended complaint that omitted all direct references to purchases. What began as a class of brokers who "purchased" the subject securities during the class period became a class of brokers who "owned and continued to own" those securities. See *id.*, at 52a.

Meanwhile, dozens of other suits, based on allegations similar to Dabit's, had been filed against Merrill Lynch around the country on both federal- and state-law theories of liability. The Judicial Panel on Multidistrict Litigation transferred all of those cases, along with this one, to the United States District Court for the Southern District of New York for consolidated pretrial proceedings. Merrill Lynch then filed its second motion to dismiss Dabit's complaint. Senior Judge Milton Pollack granted the motion on the ground that the claims alleged fell "squarely within SLUSA's ambit."

*In re Merrill Lynch & Co., Inc.*, 2003 WL 1872820, *1 (Apr. 10, 2003).

The Court of Appeals for the Second Circuit, however, vacated the judgment and remanded for further proceedings. 395 F. 3d, at 51. It concluded that the claims asserted by holders did not allege fraud "in connection with the purchase or sale" of securities under SLUSA. Although the court agreed with Merrill Lynch that that phrase, as used in other federal securities laws, has been defined broadly by this Court, it held that Congress nonetheless intended a narrower meaning here—one that incorporates the "standing" limitation on private federal securities actions adopted in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975). Under the Second Circuit's analysis, fraud is only "in connection with the purchase or sale" of securities, as used in SLUSA, if it is alleged by a purchaser or seller of securities. Thus, to the extent that the complaint in this action alleged that brokers were fraudulently induced, not to sell or purchase, but to retain or delay selling their securities, it fell outside SLUSA's pre-emptive scope.[3]

After determining that the class defined in Dabit's amended complaint did not necessarily exclude purchasers, the panel remanded with instructions that the pleading be dismissed without prejudice. The court's order would permit Dabit to file another amended complaint that defines the class to exclude "claimants who purchased in connection with the fraud and who therefore could meet the standing requirement" for a federal damages action, and to include only those "who came to hold [a Merrill Lynch] Stock before any relevant misrepresentation." 395 F. 3d, at 45–46. Under the Second Circuit's analysis, a class action so limited could be sustained under state law. For the reasons that follow, we disagree.

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[3] The Court of Appeals also concluded that Dabit's lost commission claims escaped pre-emption under SLUSA because they did not "allege fraud that 'coincide[s]' with the sale or purchase of a security." 395 F. 3d, at 47 (quoting *SEC* v. *Zandford*, 535 U. S. 813, 825 (2002)). That determination is not before this Court for review.

## II

The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated. In response to the sudden and disastrous collapse in prices of listed stocks in 1929, and the Great Depression that followed, Congress enacted the Securities Act of 1933 (1933 Act), 48 Stat. 74, and the Securities Exchange Act of 1934 (1934 Act), 48 Stat. 881. Since their enactment, these two statutes have anchored federal regulation of vital elements of our economy.

Securities and Exchange Commission (SEC) Rule 10b–5, 17 CFR § 240.10b–5 (2005), promulgated in 1942 pursuant to § 10(b) of the 1934 Act, 15 U. S. C. § 78j(b), is an important part of that regulatory scheme. The Rule, like § 10(b) itself,[4] broadly prohibits deception, misrepresentation, and fraud "in connection with the purchase or sale of any security."[5] The

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[4] Section 10(b) provides as follows:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . . . .

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U. S. C. § 78j(b).

[5] The text of the Rule is as follows:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

. . . . .

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

SEC has express statutory authority to enforce the Rule. See 15 U. S. C. § 78u (2000 ed. and Supp. III). Although no such authority is expressly granted to private individuals injured by securities fraud, in 1946 Judge Kirkpatrick of the United States District Court for the Eastern District of Pennsylvania, relying on "the general purpose" of the Rule, recognized an implied right of action thereunder. *Kardon* v. *National Gypsum Co.,* 69 F. Supp. 512, 514. His holding was adopted by an "overwhelming consensus of the District Courts and Courts of Appeals," *Blue Chip Stamps,* 421 U. S., at 730, and endorsed by this Court in *Superintendent of Ins. of N. Y.* v. *Bankers Life & Casualty Co.,* 404 U. S. 6 (1971).

A few years after *Kardon* was decided, the Court of Appeals for the Second Circuit limited the reach of the private right of action under Rule 10b–5. In *Birnbaum* v. *Newport Steel Corp.,* 193 F. 2d 461 (1952), a panel composed of Chief Judge Swan and Judges Augustus and Learned Hand upheld the dismissal of a suit brought on behalf of a corporation and a class of its stockholders alleging that fraud "in connection with" a director's sale of his controlling block of stock to third parties violated Rule 10b–5. The court held that the Rule could only be invoked by a purchaser or seller of securities to remedy fraud associated with his or her own sale or purchase of securities, and did not protect those who neither purchased nor sold the securities in question but were instead injured by corporate insiders' sales to third parties. *Id.,* at 464. While the *Birnbaum* court did not question the plaintiffs' "standing" to enforce Rule 10b–5, later cases treated its holding as a standing requirement. See *Eason* v. *General Motors Acceptance Corp.,* 490 F. 2d 654, 657 (CA7 1973).

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"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

"in connection with the purchase or sale of any security." 17 CFR § 240.10b–5 (2005).

By the time this Court first confronted the question, literally hundreds of lower court decisions had accepted "*Birnbaum*'s conclusion that the plaintiff class for purposes of § 10(b) and Rule 10b–5 private damage actions is limited to purchasers and sellers." *Blue Chip Stamps,* 421 U. S., at 731–732. Meanwhile, however, cases like *Bankers Life & Casualty Co.* had interpreted the coverage of the Rule more broadly to prohibit, for example, "deceptive practices *touching* [a victim's] sale of securities as an investor." 404 U. S., at 12–13 (emphasis added); see *Eason,* 490 F. 2d, at 657 (collecting cases). The "judicial oak which ha[d] grown from little more than a legislative acorn," as then-Justice Rehnquist described the rules governing private Rule 10b–5 actions, *Blue Chip Stamps,* 421 U. S., at 737, had thus developed differently from the law defining what constituted a substantive violation of Rule 10b–5. Ultimately, the Court had to decide whether to permit private parties to sue for any violation of Rule 10b–5 that caused them harm, or instead to limit the private remedy to plaintiffs who were themselves purchasers or sellers.

Relying principally on "policy considerations" which the Court viewed as appropriate in explicating a judicially crafted remedy, *ibid.,* and following judicial precedent rather than "the many commentators" who had criticized the *Birnbaum* rule as "an arbitrary restriction which unreasonably prevents some deserving plaintiffs from recovering damages," 421 U. S., at 738, the Court in *Blue Chip Stamps* chose to limit the private remedy. The main policy consideration tipping the scales in favor of precedent was the widespread recognition that "litigation under Rule 10b–5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Id.,* at 739. Even weak cases brought under the Rule may have substantial settlement value, the Court explained, because "[t]he very pendency of the lawsuit may frustrate or delay normal business activity." *Id.,* at 740. Cabining the private cause of action by means of the purchaser-seller limitation would, in the Court's view, minimize these ill effects. The limitation of course had no application in Government enforcement actions brought pursuant to Rule 10b–5. See *id.*, at 751, n. 14.

### III

Policy considerations similar to those that supported the Court's decision in *Blue Chip Stamps* prompted Congress, in 1995, to adopt legislation targeted at perceived abuses of the class-action vehicle in litigation involving nationally traded securities. While acknowledging that private securities litigation was "an indispensable tool with which defrauded investors can recover their losses," the House Conference Report accompanying what would later be enacted as the Private Securities Litigation Reform Act of 1995 (Reform Act), 109 Stat. 737 (codified at 15 U. S. C. §§ 77z–1 and 78u–4), identified ways in which the class-action device was being used to injure "the entire U. S. economy." H. R. Conf. Rep. No. 104–369, p. 31 (1995). According to the Report, nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and "manipulation by class action lawyers of the clients whom they purportedly represent" had become rampant in recent years. *Ibid.* Proponents of the Reform Act argued that these abuses resulted in extortionate settlements, chilled any discussion of issuers' future prospects, and deterred qualified individuals from serving on boards of directors. *Id.*, at 31–32.

Title I of the Reform Act, captioned "Reduction of Abusive Litigation," represents Congress' effort to curb these perceived abuses. Its provisions limit recoverable damages and attorney's fees, provide a "safe harbor" for forward-looking statements, impose new restrictions on the selection of (and compensation awarded to) lead plaintiffs, mandate imposition of sanctions for frivolous litigation, and authorize a stay of discovery pending resolution of any motion to dismiss. See 15 U. S. C. § 78u–4. Title I also imposes heightened pleading requirements in actions brought pursuant to § 10(b) and Rule 10b–5; it "insists that securities fraud complaints 'specify' each misleading statement; that they set forth the facts 'on which [a] belief' that a statement is misleading was 'formed'; and that they 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 345 (2005) (quoting 15 U. S. C. §§78u–4(b)(1), (2)).

The effort to deter or at least quickly dispose of those suits whose nuisance value outweighs their merits placed special burdens on plaintiffs seeking to bring federal securities fraud class actions. But the effort also had an unintended consequence: It prompted at least some members of the plaintiffs' bar to avoid the federal forum altogether. Rather than face the obstacles set in their path by the Reform Act, plaintiffs and their representatives began bringing class actions under state law, often in state court. The evidence presented to Congress during a 1997 hearing to evaluate the effects of the Reform Act suggested that this phenomenon was a novel one; state-court litigation of class actions involving nationally traded securities had previously been rare. See H. R. Rep. No. 105–640, p. 10 (1998); S. Rep. No. 105–182, pp. 3–4 (1998). To stem this "shif[t] from Federal to State courts" and "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of" the Reform Act, SLUSA §§2(2), (5), 112 Stat. 3227, Congress enacted SLUSA.

## IV

The core provision of SLUSA reads as follows:[6]

> "CLASS ACTION LIMITATIONS.—No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

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[6] SLUSA amends the 1933 Act and the 1934 Act in substantially identical ways. For convenience and because they are more pertinent here, we quote the amendments to the 1934 Act.

> "(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> "(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." *Id.*, at 3230 (codified as amended at 15 U. S. C. § 78bb(f)(1)).[7]

A "covered class action" is a lawsuit in which damages are sought on behalf of more than 50 people.[8] A "covered security" is one traded nationally and listed on a regulated national exchange.[9] Respondent does not dispute that both the class and the securities at issue in this case are "covered" within the meaning of the statute, or that the complaint alleges misrepresentations and omissions of material facts. The only disputed issue is whether the alleged wrongdoing was "in connection with the purchase or sale" of securities.

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[7] Another key provision of the statute makes all "covered class actions" filed in state court removable to federal court. 112 Stat. 3230 (codified at 15 U. S. C. § 78bb(f)(2)).

[8] "The term 'covered class action' means—

"(i) any single lawsuit in which—

"(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

"(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

"(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—

"(I) damages are sought on behalf of more than 50 persons; and

"(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose." 112 Stat. 3232 (codified at 15 U. S. C. § 78bb(f)(5)(B)).

[9] "The term 'covered security' means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) of the Securities Act of 1933, at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred . . . ." 112 Stat. 3232 (codified at 15 U. S. C. § 78bb(f)(5)(E)). Section 18(b) of the 1933 Act in turn defines "covered security" to include securities traded on a national exchange. § 77r(b).

Respondent urges that the operative language must be read narrowly to encompass (and therefore pre-empt) only those actions in which the purchaser-seller requirement of *Blue Chip Stamps* is met. Such, too, was the Second Circuit's view. But insofar as the argument assumes that the rule adopted in *Blue Chip Stamps* stems from the text of Rule 10b–5—specifically, the "in connection with" language, it must be rejected. Unlike the *Birnbaum* court, which relied on Rule 10b–5's text in crafting its purchaser-seller limitation, this Court in *Blue Chip Stamps* relied chiefly, and candidly, on "policy considerations" in adopting that limitation. 421 U. S., at 737. The *Blue Chip Stamps* Court purported to define the scope of a private right of action under Rule 10b–5—not to define the words "in connection with the purchase or sale." *Id.*, at 749 ("No language in either [§ 10(b) or Rule 10b–5] speaks at all to the contours of a private cause of action for their violation"). Any ambiguity on that score had long been resolved by the time Congress enacted SLUSA. See *United States* v. *O'Hagan*, 521 U. S. 642, 656, 664 (1997); *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 285 (1992) (O'Connor, J., concurring in part and concurring in judgment); *id.*, at 289–290 (SCALIA, J., concurring in judgment); *United States* v. *Naftalin*, 441 U. S. 768, 774, n. 6 (1979); see also 395 F. 3d, at 39 (acknowledging that "[t]he limitation on standing to bring [a] private suit for damages for fraud in connection with the purchase or sale of securities is unquestionably a distinct concept from the general statutory and regulatory prohibition on fraud in connection with the purchase or sale of securities").

Moreover, when this Court *has* sought to give meaning to the phrase in the context of § 10(b) and Rule 10b–5, it has espoused a broad interpretation. A narrow construction would not, as a matter of first impression, have been unreasonable; one might have concluded that an alleged fraud is "in connection with" a purchase or sale of securities only when the plaintiff himself was defrauded into purchasing or selling particular securities. After all, that was the interpretation adopted by the panel in the *Birnbaum* case. See 193 F. 2d, at 464. But this Court, in early cases like *Superintendent of Ins. of N. Y.* v. *Bankers Life & Casualty Co.*, 404 U. S. 6 (1971), and most recently in *SEC* v. *Zandford*, 535 U. S. 813, 820, 822 (2002), has rejected that view. Under our precedents, it is enough that the fraud alleged "coincide" with a securities transaction—whether by the plaintiff or by someone else. See *O'Hagan*, 521 U. S., at 651. The requisite showing, in other words, is "deception 'in connection with the purchase or sale of any security,' not deception of an identifiable purchaser or seller." *Id.*, at 658. Notably, this broader interpretation of the statutory language comports with the longstanding views of the SEC. See *Zandford*, 535 U. S., at 819–820.[10]

Congress can hardly have been unaware of the broad construction adopted by both this Court and the SEC when it imported the key phrase—"in connection with the purchase or sale"—into SLUSA's core provision. And when "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well." *Bragdon* v.

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[10] In *Zandford*, we observed that the SEC has consistently "maintained that a broker who accepts payment for securities that he never intends to deliver, or who sells customer securities with intent to misappropriate the proceeds, violates § 10(b) and Rule 10b–5." 535 U. S., at 819. Here, too, the SEC supports a broad reading of the "in connection with" language.

*Abbott*, 524 U. S. 624, 645 (1998); see *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–699 (1979). Application of that presumption is particularly apt here; not only did Congress use the same words as are used in § 10(b) and Rule 10b–5, but it used them in a provision that appears in the same statute as § 10(b). Generally, "identical words used in different parts of the same statute are . . . presumed to have the same meaning." *IBP, Inc.* v. *Alvarez*, 546 U. S. 21, 34 (2005).

The presumption that Congress envisioned a broad construction follows not only from ordinary principles of statutory construction but also from the particular concerns that culminated in SLUSA's enactment. A narrow reading of the statute would undercut the effectiveness of the 1995 Reform Act and thus run contrary to SLUSA's stated purpose, viz., "to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives" of the 1995 Act. SLUSA § 2(5), 112 Stat. 3227. As the *Blue Chip Stamps* Court observed, class actions brought by holders pose a special risk of vexatious litigation. 421 U. S., at 739. It would be odd, to say the least, if SLUSA exempted that particularly troublesome subset of class actions from its pre-emptive sweep. See *Kircher*, 403 F. 3d, at 484.

Respondent's preferred construction also would give rise to wasteful, duplicative litigation. Facts supporting an action by purchasers under Rule 10b–5 (which must proceed in federal court if at all) typically support an action by holders as well, at least in those States that recognize holder claims. The prospect is raised, then, of parallel class actions proceeding in state and federal court, with different standards governing claims asserted on identical facts. That prospect, which exists to some extent in this very case,[11] squarely conflicts with the congressional preference for "national standards for securities class action lawsuits involving nationally traded securities." SLUSA § 2(5), 112 Stat. 3227.[12]

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[11] See 2003 WL 1872820, *1 (SDNY, Apr. 10, 2003) (observing that Dabit's holder claims rested "on the very same alleged series of transac-

In concluding that SLUSA pre-empts state-law holder class-action claims of the kind alleged in Dabit's complaint, we do not lose sight of the general "presum[ption] that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc.* v. *Lohr,* 518 U. S. 470, 485 (1996). But that presumption carries less force here than in other contexts because SLUSA does not actually pre-empt any state cause of action. It simply denies plaintiffs the right to use the class-action device to vindicate certain claims. The Act does not deny any individual plaintiff, or indeed any group of fewer than 50 plaintiffs, the right to enforce any state-law cause of action that may exist.

Moreover, the tailored exceptions to SLUSA's pre-emptive command demonstrate that Congress did not by any means act "cavalierly" here. The statute carefully exempts from its operation certain class actions based on the law of the State in which the issuer of the covered security is incorporated, actions brought by a state agency or state pension plan, actions under contracts between issuers and indenture trustees, and derivative actions brought by shareholders on behalf of a corporation. 15 U. S. C. §§ 78bb(f)(3)(A)–(C), (f)(5)(C). The statute also expressly preserves state jurisdiction over state agency enforcement proceedings. § 78bb(f)(4). The existence of these carve-outs both evinces congressional sensitivity to state prerogatives in this field

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tions and occurrences asserted in the federal securities actions" filed against Merrill Lynch).

[12] See H. R. Rep. No. 105–640, p. 10 (1998) (the "solution" to circumvention of the Reform Act "is to make Federal court the exclusive venue for securities fraud class action litigation"); S. Rep. No. 105–182, p. 3 (1998) (identifying "the danger of maintaining differing federal and state standards of liability for nationally-traded securities").

and makes it inappropriate for courts to create additional, implied exceptions.

Finally, federal law, not state law, has long been the principal vehicle for asserting class-action securities fraud claims. See, *e. g.*, H. R. Conf. Rep. No. 105–803, p. 14 (1998) ("Prior to the passage of the Reform Act, there was essentially no significant securities class action litigation brought in State court").[13] More importantly, while state-law holder claims were theoretically available both before and after the decision in *Blue Chip Stamps*, the actual assertion of such claims by way of class action was virtually unheard of before SLUSA was enacted; respondent and his *amici* have identified only *one* pre-SLUSA case involving a state-law class action asserting holder claims.[14] This is hardly a situation, then, in which a federal statute has eliminated a historically entrenched state-law remedy. Cf. *Bates* v. *Dow Agrosciences LLC*, 544 U. S. 431, 449 (2005) (observing that a "long history" of state-law tort remedy "add[ed] force" to the presumption against pre-emption).

## V

The holder class action that respondent tried to plead, and that the Second Circuit envisioned, is distinguishable from a typical Rule 10b–5 class action in only one respect: It is brought by holders instead of purchasers or sellers. For purposes of SLUSA pre-emption, that distinction is irrelevant; the identity of the plaintiffs does not determine whether the complaint alleges fraud "in connection with the purchase or sale" of securities. The misconduct of which respondent complains here—fraudulent manipulation of stock prices—unquestionably qualifies as fraud "in connection with the purchase or sale" of securities as the phrase is defined in *Zandford,* 535 U. S., at 820, 822, and *O'Hagan,* 521 U. S., at 651.

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[13] Respondent points out that the Court in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975), identified as a factor mitigating any unfairness caused by adoption of the purchaser-seller requirement that "remedies are available to nonpurchasers and nonsellers under state law." *Id.*, at 738, n. 9. He argues that this supports a narrow construction of SLUSA's pre-emption provision. But we do not here revisit the *Blue Chip Stamps* Court's understanding of the equities involved in limiting the availability of private remedies under federal law; we are concerned instead with Congress' intent in adopting a pre-emption provision, the evident purpose of which is to limit the availability of remedies under state law.

[14] See Brief for Respondent 5 (citing *Weinberger* v. *Kendrick*, 698 F. 2d 61, 78 (CA2 1982) (approving a settlement that included holder claims brought pursuant to New York law)); see also Tr. of Oral Arg. 34–35.

The judgment of the Court of Appeals for the Second Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE ALITO took no part in the consideration or decision of this case.

# UNITED STATES *v.* GRUBBS

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–1414. Argued January 18, 2006—Decided March 21, 2006

A Magistrate Judge issued an "anticipatory" search warrant for respondent Grubbs' house based on a federal officer's affidavit. The affidavit explained that the warrant would not be executed until a parcel containing a videotape of child pornography—which Grubbs had ordered from an undercover postal inspector—was received at, and physically taken into, the residence. The affidavit also referred to two attachments describing the residence and the items to be seized. After the package was delivered and the search commenced, Grubbs was given a copy of the warrant, which included the attachments but not the supporting affidavit. When he admitted ordering the videotape, he was arrested, and the videotape and other items were seized. Following his indictment for receiving child pornography, see 18 U. S. C. § 2252(a)(2), Grubbs moved to suppress the seized evidence, arguing, *inter alia,* that the warrant was invalid because it failed to list the triggering condition. The District Court denied the motion, and Grubbs pleaded guilty. The Ninth Circuit reversed, concluding that the warrant ran afoul of the Fourth Amendment's particularity requirement, which, under Circuit precedent, applied to the conditions precedent to an anticipatory warrant.

*Held:*

1. Anticipatory warrants are not categorically unconstitutional under the Fourth Amendment's provision that "no Warrants shall issue, but upon probable cause." Probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates,* 462 U. S. 213, 238. When an anticipatory warrant is issued, the fact that the contraband is not presently at the place described is immaterial, so long as there is probable cause to believe it will be there when the warrant is executed. Anticipatory warrants are, therefore, no different in principle from ordinary warrants: They require the magistrate to determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed. Where the anticipatory warrant places a condition (other than the mere passage of time) upon its execution, the first of these determinations goes not

merely to what will probably be found *if* the condition is met, but also to the likelihood that the condition *will* be met, and thus that a proper object of seizure will be on the described premises. Here, the occurrence of the triggering condition—successful delivery of the videotape—would plainly establish probable cause for the search, and the affidavit established probable cause to believe the triggering condition would be satisfied. Pp. 94–97.

2. The warrant at issue did not violate the Fourth Amendment's particularity requirement. The Amendment specifies only two matters that the warrant must "particularly describ[e]": "the place to be searched" and "the persons or things to be seized." That language is decisive here; the particularity requirement does not include the conditions precedent to execution of the warrant. Cf. *Dalia* v. *United States*, 441 U. S. 238, 255, 257. Respondent's two policy rationales—that setting forth the triggering condition in the warrant itself is necessary (1) to delineate the limits of the executing officer's power and (2) to allow the individual whose property is searched or seized to police the officer's conduct—find no basis in either the Fourth Amendment or Federal Rule of Criminal Procedure 41. Pp. 97–99.

377 F. 3d 1072 and 389 F. 3d 1306, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and BREYER, JJ., joined, and in which STEVENS, SOUTER, and GINSBURG, JJ., joined as to Parts I and II. SOUTER, J., filed an opinion concurring in part and concurring in the judgment, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 99. ALITO, J., took no part in the consideration or decision of the case.

*Deputy Solicitor General Dreeben* argued the cause for the United States. With him on the briefs were *Solicitor General Clement, Assistant Attorney General Fisher,* and *Dan Himmelfarb.*

*Mark J. Reichel* argued the cause for respondent. With him on the brief were *Linda C. Harter* and *Jeffrey T. Green.**

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**Daniel L. Kaplan* and *Jeffrey L. Fisher* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging affirmance.

*Ric Simmons* filed a brief for the National Association of Federal Defenders as *amicus curiae.*

JUSTICE SCALIA delivered the opinion of the Court.

Federal law enforcement officers obtained a search warrant for respondent's house on the basis of an affidavit explaining that the warrant would be executed only after a controlled delivery of contraband to that location. We address two challenges to the constitutionality of this anticipatory warrant.

## I

Respondent Jeffrey Grubbs purchased a videotape containing child pornography from a Web site operated by an undercover postal inspector. Officers from the Postal Inspection Service arranged a controlled delivery of a package containing the videotape to Grubbs' residence. A postal inspector submitted a search warrant application to a Magistrate Judge for the Eastern District of California, accompanied by an affidavit describing the proposed operation in detail. The affidavit stated:

> "Execution of this search warrant will not occur unless and until the parcel has been received by a person(s) and has been physically taken into the residence . . . . At that time, and not before, this search warrant will be executed by me and other United States Postal inspectors, with appropriate assistance from other law enforcement officers in accordance with this warrant's command." App. to Pet. for Cert. 72a.

In addition to describing this triggering condition, the affidavit referred to two attachments, which described Grubbs' residence and the items officers would seize. These attachments, but not the body of the affidavit, were incorporated into the requested warrant. The affidavit concluded:

> "Based upon the foregoing facts, I respectfully submit there exists probable cause to believe that the items set forth in Attachment B to this affidavit and the search warrant, will be found [at Grubbs' residence], which residence is further described at Attachment A." *Ibid.*

The Magistrate Judge issued the warrant as requested. Two days later, an undercover postal inspector delivered the package. Grubbs' wife signed for it and took the unopened package inside. The inspectors detained Grubbs as he left his home a few minutes later, then entered the house and commenced the search. Roughly 30 minutes into the search, Grubbs was provided with a copy of the warrant, which included both attachments but not the supporting affidavit that explained when the warrant would be executed. Grubbs consented to interrogation by the postal inspectors and admitted ordering the videotape. He was placed under arrest, and various items were seized, including the videotape.

A grand jury for the Eastern District of California indicted Grubbs on one count of receiving a visual depiction of a minor engaged in sexually explicit conduct. See 18 U. S. C. § 2252(a)(2). He moved to suppress the evidence seized during the search of his residence, arguing as relevant here that the warrant was invalid because it failed to list the triggering condition. After an evidentiary hearing, the District Court denied the motion. Grubbs pleaded guilty, but reserved his right to appeal the denial of his motion to suppress.

The Court of Appeals for the Ninth Circuit reversed. 377 F. 3d 1072, amended, 389 F. 3d 1306 (2004). Relying on Circuit precedent, it held that "the particularity requirement of the Fourth Amendment applies with full force to the conditions precedent to an anticipatory search warrant." 377 F. 3d, at 1077–1078 (citing *United States* v. *Hotal,* 143 F. 3d 1223, 1226 (CA9 1998)). An anticipatory warrant defective for that reason may be "cur[ed]" if the conditions precedent are set forth in an affidavit that is incorporated in the warrant and "presented to the person whose property is being searched." 377 F. 3d, at 1079. Because the postal inspectors "failed to present the affidavit—the only document in which the triggering conditions were listed"—to Grubbs or his wife, the "warrant was . . . inoperative, and the search was illegal." *Ibid.* We granted certiorari. 545 U. S. 1164 (2005).

## II

Before turning to the Ninth Circuit's conclusion that the warrant at issue here ran afoul of the Fourth Amendment's particularity requirement, we address the antecedent question whether anticipatory search warrants are categorically unconstitutional.[1] An anticipatory warrant is "a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place." 2 W. LaFave, Search and Seizure § 3.7(c), p. 398 (4th ed. 2004). Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time—a so-called "triggering condition." The affidavit at issue here, for instance, explained that "[e]xecution of th[e] search warrant will not occur unless and until the parcel [containing child pornography] has been received by a person(s) and has been physically taken into the residence." App. to Pet. for Cert. 72a. If the government were to execute an anticipatory warrant before the triggering condition occurred, there would be no reason to believe the item described in the warrant could be found at the searched location; by definition, the triggering condition which establishes probable cause has not yet been satisfied when the warrant is issued. Grubbs argues that for this reason anticipatory warrants contravene the Fourth

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[1] This issue is "predicate to an intelligent resolution of the question presented." *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996) (internal quotation marks omitted). It makes little sense to address what the Fourth Amendment requires of anticipatory search warrants if it does not allow them at all. Cf. *Wilkinson* v. *Austin*, 545 U. S. 209, 221 (2005) (addressing whether inmates had a liberty interest in avoiding assignment to a "Supermax" prison, despite the State's concession that they did, because "[w]e need reach the question of what process is due only if the inmates establish a constitutionally protected liberty interest").

Amendment's provision that "no Warrants shall issue, but upon probable cause."

We reject this view, as has every Court of Appeals to confront the issue, see, *e. g.*, *United States* v. *Loy*, 191 F. 3d 360, 364 (CA3 1999) (collecting cases). Probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates*, 462 U. S. 213, 238 (1983). Because the probable-cause requirement looks to whether evidence will be found *when the search is conducted*, all warrants are, in a sense, "anticipatory." In the typical case where the police seek permission to search a house for an item they believe is already located there, the magistrate's determination that there is probable cause for the search amounts to a prediction that the item will still be there when the warrant is executed. See *People* v. *Glen*, 30 N. Y. 2d 252, 258, 282 N. E. 2d 614, 617 (1972) ("[P]resent possession is only probative of the likelihood of future possession").[2] The anticipatory nature of warrants is even clearer in the context of electronic surveillance. See, *e. g.*, *Katz* v. *United States*, 389 U. S. 347 (1967). When police request approval to tap a telephone line, they do so based on the probability that, during the course of the surveillance, the subject *will* use the phone to engage in crime-related conversations. The relevant federal provision requires a judge authorizing "interception of wire, oral, or electronic communications" to determine that "there is probable cause for belief that particular communications concerning [one of various listed offenses] *will be obtained* through such interception." 18 U. S. C. § 2518(3)(b) (emphasis added); see also *United States* v. *Ricciardelli,* 998 F. 2d 8, 11, n. 3 (CA1 1993) ("[T]he magistrate issues the warrant on the basis of a substantial probability that crime-related conversations will ensue"). Thus, when an anticipatory warrant is issued, "the fact that the contraband is not presently located at the place described in the warrant is immaterial, so long as there is probable cause to believe that it will be there when the search warrant is executed." *United States* v. *Garcia,* 882 F. 2d 699, 702 (CA2 1989) (quoting *United States* v. *Lowe,* 575 F. 2d 1193, 1194 (CA6 1978); internal quotation marks omitted).

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[2] For this reason, probable cause may cease to exist after a warrant is issued. The police may learn, for instance, that contraband is no longer located at the place to be searched. See, *e. g.*, *United States* v. *Bowling*, 900 F. 2d 926, 932 (CA6 1990) (recognizing that a fruitless consent search could "dissipat[e] the probable cause that justified a warrant"). Or the probable-cause showing may have grown "stale" in view of the time that has passed since the warrant was issued. See *United States* v. *Wagner*, 989 F. 2d 69, 75 (CA2 1993) ("[T]he facts in an affidavit supporting a search warrant must be sufficiently close in time to the issuance of the warrant and the subsequent search conducted so that probable cause can be said to exist as of the time of the search and not simply as of some time in the past"); see also *Sgro* v. *United States*, 287 U. S. 206, 210–211 (1932).

Anticipatory warrants are, therefore, no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed. It should be noted, however, that where the anticipatory warrant places a condition (other than the mere passage of time) upon its execution, the first of these determinations goes not merely to what will probably be found *if* the condition is met. (If that were the extent of the probability determination, an anticipatory warrant could be issued for every house in the country, authorizing search and seizure *if* contraband should be delivered—though for any single location there is no likelihood that contraband will be delivered.) Rather, the probability determination for a conditioned anticipatory warrant looks also to the likelihood that the condition will occur, and thus that a proper object of seizure will be on the described premises. In other words, for a conditioned anticipatory warrant to comply with the Fourth Amendment's requirement of probable cause, two prerequisites of probability must be satisfied. It must be true not only that *if* the triggering condition occurs "there is a fair probability that contraband or evidence of a crime will be found in a particular place," *Gates, supra,* at 238, but also that there is probable cause to believe the triggering condition *will occur.* The supporting affidavit must provide the magistrate with sufficient information to evaluate both aspects of the probable-cause determination. See *Garcia, supra,* at 703.

In this case, the occurrence of the triggering condition—successful delivery of the videotape to Grubbs' residence—would plainly establish probable cause for the search. In addition, the affidavit established probable cause to believe the triggering condition would be satisfied. Although it is possible that Grubbs could have refused delivery of the videotape he had ordered, that was unlikely. The Magistrate therefore "had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Gates, supra,* at 238–239 (quoting *Jones* v. *United States,* 362 U. S. 257, 271 (1960)).

## III

The Ninth Circuit invalidated the anticipatory search warrant at issue here because the warrant failed to specify the triggering condition. The Fourth Amendment's particularity requirement, it held, "applies with full force to the conditions precedent to an anticipatory search warrant." 377 F. 3d, at 1077–1078.

The Fourth Amendment, however, does not set forth some general "particularity requirement." It specifies only two matters that must be "particularly describ[ed]" in the warrant: "the place to be searched" and "the persons or things to be seized." We have previously rejected efforts to expand the scope of this provision to embrace unenumerated matters. In *Dalia* v. *United States,* 441 U. S. 238 (1979), we considered an order authorizing the interception of oral communications by means of a "bug" installed by the police in the petitioner's office. The petitioner argued that, if a covert entry is necessary to install such a listening device, the authorizing order must "explicitly set forth its approval of such entries before the fact." *Id.,* at 255. This argument fell before the "'precise and clear'" words of the Fourth

Amendment: "Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the [requirements set forth in the text], search warrants also must include a specification of the precise manner in which they are to be executed." *Ibid.* (quoting *Stanford* v. *Texas*, 379 U. S. 476, 481 (1965)); 441 U. S., at 257. The language of the Fourth Amendment is likewise decisive here; its particularity requirement does not include the conditions precedent to execution of the warrant.

Respondent, drawing upon the Ninth Circuit's analysis below, relies primarily on two related policy rationales. First, he argues, setting forth the triggering condition in the warrant itself is necessary "to delineate the limits of the executing officer's power." Brief for Respondent 20. This is an application, respondent asserts, of the following principle: "[I]f there is a precondition to the valid exercise of executive power, that precondition must be particularly identified on the face of the warrant." *Id.*, at 23. That principle is not to be found in the Constitution. The Fourth Amendment does not require that the warrant set forth the magistrate's basis for finding probable cause, even though probable cause is the quintessential "precondition to the valid exercise of executive power." Much less does it require description of a triggering condition.

Second, respondent argues that listing the triggering condition in the warrant is necessary to " 'assur[e] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.' " *Id.*, at 19 (quoting *United States* v. *Chadwick*, 433 U. S. 1, 9 (1977)). The Ninth Circuit went even further, asserting that if the property owner were not informed of the triggering condition, he "would 'stand [no] real chance of policing the officers' conduct.' " 377 F. 3d, at 1079 (quoting *Ramirez* v. *Butte-Silver Bow County*, 298 F. 3d 1022, 1027 (CA9 2002)). This argument assumes that the executing officer must present the property owner with a copy of the warrant before conducting his search. See 377 F. 3d, at 1079, n. 9. In fact, however, neither the Fourth Amendment nor Federal Rule of Criminal Procedure 41 imposes such a requirement. See *Groh* v. *Ramirez*, 540 U. S. 551, 562, n. 5 (2004). "The absence of a constitutional requirement that the warrant be exhibited at the outset of the search, or indeed until the search has ended, is . . . evidence that the requirement of particular description does not protect an interest in monitoring searches." *United States* v. *Stefonek*, 179 F. 3d 1030, 1034 (CA7 1999) (citations omitted). The Constitution protects property owners not by giving them license to engage the police in a debate over the basis for the warrant, but by interposing, *ex ante*, the "deliberate, impartial judgment of a judicial officer . . . between the citizen and the police," *Wong Sun* v. *United States*, 371 U. S. 471, 481–482 (1963), and by providing, *ex post*, a right to suppress evidence improperly obtained and a cause of action for damages.

* * *

Because the Fourth Amendment does not require that the triggering condition for an anticipatory search warrant be set forth in the warrant itself, the Court of Appeals erred in invalidating the warrant at issue here. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE ALITO took no part in the consideration or decision of this case.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, concurring in part and concurring in the judgment.

I agree with the Court that anticipatory warrants are constitutional for the reasons stated in Part II of the Court's opinion, and I join in the disposition of this case. But I would qualify some points made in Part III.

The Court notes that a warrant's failure to specify the place to be searched and the objects sought violates an express textual requirement of the Fourth Amendment, whereas the text says nothing about a condition placed by the issuing magistrate on the authorization to search (here, delivery of the package of contraband). That textual difference is, however, no authority for neglecting to specify the point or contingency intended by the magistrate to trigger authorization, and the government should beware of banking on the terms of a warrant without such specification. The notation of a starting date was an established feature even of the objectionable 18th-century writs of assistance, see, *e. g.*, Massachusetts Writs of Assistance Bill, 1762, reprinted in M. Smith, The Writs of Assistance Case 567–568 (1978); Writ of Assistance (English) of George III, 1761, reprinted in *id.*, at 524–527. And it is fair to say that the very word "warrant" in the Fourth Amendment means a statement of authority that sets out the time at which (or, in the case of anticipatory warrants, the condition on which) the authorization begins.*

An issuing magistrate's failure to mention that condition can lead to several untoward consequences with constitutional significance. To begin with, a warrant that fails to tell the truth about what a magistrate authorized cannot inform the police officer's responsibility to respect the limits of authorization, see *Groh* v. *Ramirez*, 540 U. S. 551, 560–563, and n. 4 (2004), a failing assuming real significance when the warrant is not executed by the official who applied for it and happens to know the unstated condition. The peril is that if an officer simply takes such a warrant on its face and makes the ostensibly authorized search before the unstated condition has been met, the search will be held unreasonable. It is true that we have declined to apply the exclusionary rule when a police officer reasonably relies on the product of a magistrate's faulty judgment or sloppy practice, see *Massachusetts* v. *Sheppard,* 468 U. S. 981, 987–991 (1984). But when a government officer obtains what the magistrate says is an anticipatory warrant, he must know or should realize when it omits the condition on which authorization depends, and it is hard to see why the government should not be held to the condition despite the unconditional face of the warrant. Cf. *Groh* v. *Ramirez, supra,* at 554–555, 563, and n. 6 (declaring unconstitutional a search conducted pursuant to a warrant failing to specify the items the government asked the magistrate permission to seize in part because "officers leading a search team must 'make sure that they have a proper warrant that in fact authorizes the search and seizure they are about to conduct'" (brackets omitted)).

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*Federal Rule of Criminal Procedure 41(e)(2)(A) in fact requires that an issued warrant command the executing officer to "execute the warrant within a specified time no longer than 10 days."

Nor does an incomplete anticipatory warrant address an owner's interest in an accurate statement of the government's authority to search property. To be sure, the extent of that interest is yet to be settled; in *Groh* v. *Ramirez, supra,* the Court was careful to note that the right of an owner to demand to see a copy of the warrant before making way for the police had not been determined, *id.,* at 562, n. 5, and it remains undetermined today. But regardless of any right on the owner's part, showing an accurate warrant reliably "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States* v. *Chadwick,* 433 U. S. 1, 9 (1977), quoted in *Groh* v. *Ramirez, supra,* at 561. And if a later case holds that the homeowner has a right to inspect the warrant on request, a statement of the condition of authorization would give the owner a right to correct any misapprehension on the police's part that the condition had been met when in fact it had not been. If the police were then to enter anyway without a reasonable (albeit incorrect) justification, the search would certainly be open to serious challenge as unreasonable within the meaning of the Fourth Amendment.

# GEORGIA *v.* RANDOLPH

## CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 04–1067. Argued November 8, 2005—Decided March 22, 2006

Respondent's estranged wife gave police permission to search the marital residence for items of drug use after respondent, who was also present, had unequivocally refused to give consent. Respondent was indicted for possession of cocaine, and the trial court denied his motion to suppress the evidence as products of a warrantless search unauthorized by consent. The Georgia Court of Appeals reversed. In affirming, the State Supreme Court held that consent given by one occupant is not valid in the face of the refusal of another physically present occupant, and distinguished *United States* v. *Matlock,* 415 U. S. 164, which recognized the permissibility of an entry made with the consent of one cooccupant in the other's absence.

*Held:* In the circumstances here at issue, a physically present cooccupant's stated refusal to permit entry renders warrantless entry and search unreasonable and invalid as to him. Pp. 109–123.

(a) The Fourth Amendment recognizes a valid warrantless entry and search of a premises when the police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, common authority over the property, and no present co-tenant objects. *Matlock, supra,* at 170; *Illinois* v. *Rodriguez,* 497 U. S. 177, 186. The constant element in assessing Fourth Amendment reasonableness in such cases is the great significance given to widely shared social expectations, which are influenced by property law but not controlled by its rules. Thus, *Matlock* not only holds that a solitary co-inhabitant may sometimes consent to a search of shared premises, but also stands for the proposition that the reasonableness of such a search is in significant part a function of commonly held understandings about the authority that co-inhabitants may exercise in ways that affect each other's interests. Pp. 109–111.

(b) *Matlock*'s example of common understanding is readily apparent. The assumption tenants usually make about their common authority when they share quarters is that any one of them may admit visitors, with the consequence that a guest obnoxious to one may be admitted in his absence. *Matlock* placed no burden on the police to eliminate the possibility of atypical arrangements, absent reason to doubt that the regular scheme was in place. Pp. 111–112.

(c) This Court took a step toward addressing the issue here when it held in *Minnesota* v. *Olson,* 495 U. S. 91, that overnight houseguests have a legitimate expectation of privacy in their temporary quarters. If that customary expectation is a foundation of a houseguest's Fourth Amendment rights, it should follow that an inhabitant of shared premises may claim at least as much. In fact, a co-inhabitant naturally has an even stronger claim. No sensible person would enter shared premises based on one occupant's invitation when a fellow tenant said to stay out. Such reticence would show not timidity but a realization that when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority. Absent some recognized hierarchy, *e. g.*, parent and child, there is no societal or legal understanding of superior and inferior as between co-tenants. Pp. 113–114.

(d) Thus, a disputed invitation, without more, gives an officer no better claim to reasonableness in entering than the officer would have absent any consent. Disputed permission is no match for the Fourth Amendment central value of "respect for the privacy of the home," *Wilson* v. *Layne,* 526 U. S. 603, 610, and the State's other countervailing claims do not add up to outweigh it.

A co-tenant who has an interest in bringing criminal activity to light or in deflecting suspicion from himself can, *e. g.*, tell the police what he knows, for use before a magistrate in getting a warrant. This case, which recognizes limits on evidentiary searches, has no bearing on the capacity of the police, at the invitation of one tenant, to enter a dwelling over another tenant's objection in order to protect a resident from domestic violence. Though alternatives to disputed consent will not always open the door to search for evidence that the police suspect is inside, nothing in social custom or its reflection in private law argues for placing a higher value on delving into private premises to search for evidence in the face of disputed consent, than on requiring clear justification before the government searches private living quarters over a resident's objection. Pp. 114–120.

(e) There are two loose ends. First, while *Matlock*'s explanation for the constitutional sufficiency of a co-tenant's consent to enter and search recognized a co-inhabitant's "right to permit the inspection in his own right," 415 U. S., at 171, n. 7, the right to admit the police is not a right as understood under property law. It is, instead, the authority recognized by customary social usage as having a substantial bearing on Fourth Amendment reasonableness in specific circumstances. The question here is whether customary social understanding accords the consenting tenant authority to prevail over the co-tenant's objection, a question *Matlock* did not answer. Second, a fine line must be drawn to avoid undercutting *Matlock*—where the defendant, though not present, was in a squad car not far away—and *Rodriguez*—where the defendant was asleep in the apartment and could have been roused by a knock on the door; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not part of the threshold colloquy, loses out. Such formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance specifically to avoid a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when no fellow occupant is on hand, the other according dispositive weight to the fellow occupant's expressed contrary indication. Pp. 120–122.

(f) Here, respondent's refusal is clear, and nothing in the record justifies the search on grounds independent of his wife's consent. Pp. 122–123.

278 Ga. 614, 604 S. E. 2d 835, affirmed.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, KENNEDY, GINSBURG, and BREYER, JJ., joined. STEVENS, J., *post*, p. 123, and BREYER, J., *post*, p. 125, filed concurring opinions. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 127. SCALIA, J., *post*, p. 142, and THOMAS, J., *post*, p. 145, filed dissenting opinions. ALITO, J., took no part in the consideration or decision of the case.

*Paula K. Smith*, Senior Assistant Attorney General of Georgia, argued the cause for petitioner. With her on the briefs were *Thurbert E. Baker*, Attorney General, and *Mary Beth Westmoreland*, Deputy Attorney General.

*Deputy Solicitor General Dreeben* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Clement, Acting Assistant Attorney General Richter, Sri Srinivasan,* and *Deborah Watson.*

*Thomas C. Goldstein* argued the cause for respondent. With him on the brief were *Amy Howe, Kevin K. Russell, Donald F. Samuel,* and *Pamela S. Karlan.**

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*A brief of *amici curiae* urging reversal was filed for the State of Colorado et al. by *John W. Suthers*, Attorney General of Colorado, *John J. Krause*, Interim Solicitor General, and *Rebecca A. Adams*, Assistant At-

JUSTICE SOUTER delivered the opinion of the Court.

The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. *Illinois* v. *Rodriguez,* 497 U. S. 177 (1990); *United States* v. *Matlock,* 415 U. S. 164 (1974). The question here is whether such an evidentiary seizure is likewise lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is present at the scene and expressly refuses to consent. We hold that, in the circumstances here at issue, a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.

## I

Respondent Scott Randolph and his wife, Janet, separated in late May 2001, when she left the marital residence in Americus, Georgia, and went to stay with her parents in Canada, taking their son and some belongings. In July, she returned to the Americus house with the child, though the record does not reveal whether her object was reconciliation or retrieval of remaining possessions.

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torney General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *M. Jane Brady* of Delaware, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Phill Kline* of Kansas, *J. Joseph Curran, Jr.*, of Maryland, *Michael A. Cox* of Michigan, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Brian Sandoval* of Nevada, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Lawrence E. Long* of South Dakota, *Mark L. Shurtleff* of Utah, *William Sorrell* of Vermont, *Rob McKenna* of Washington, and *Patrick J. Crank* of Wyoming.

*Jeffrey A. Lamken* and *Pamela Harris* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

On the morning of July 6, she complained to the police that after a domestic dispute her husband took their son away, and when officers reached the house she told them that her husband was a cocaine user whose habit had caused financial troubles. She mentioned the marital problems and said that she and their son had only recently returned after a stay of several weeks with her parents. Shortly after the police arrived, Scott Randolph returned and explained that he had removed the child to a neighbor's house out of concern that his wife might take the boy out of the country again; he denied cocaine use, and countered that it was in fact his wife who abused drugs and alcohol.

One of the officers, Sergeant Murray, went with Janet Randolph to reclaim the child, and when they returned she not only renewed her complaints about her husband's drug use, but also volunteered that there were "'items of drug evidence'" in the house. Brief for Petitioner 3. Sergeant Murray asked Scott Randolph for permission to search the house, which he unequivocally refused.

The sergeant turned to Janet Randolph for consent to search, which she readily gave. She led the officer upstairs to a bedroom that she identified as Scott's, where the sergeant noticed a section of a drinking straw with a powdery residue he suspected was cocaine. He then left the house to get an evidence bag from his car and to call the district attorney's office, which instructed him to stop the search and apply for a warrant. When Sergeant Murray returned to the house, Janet Randolph withdrew her consent. The police took the straw to the police station, along with the Randolphs. After getting a search warrant, they returned to the house and seized further evidence of drug use, on the basis of which Scott Randolph was indicted for possession of cocaine.

He moved to suppress the evidence, as products of a warrantless search of his house unauthorized by his wife's consent over his express refusal. The trial court denied the motion, ruling that Janet Randolph had common authority to consent to the search.

The Court of Appeals of Georgia reversed, 264 Ga. App. 396, 590 S. E. 2d 834 (2003), and was itself sustained by the State Supreme Court, principally on the ground that "the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search," 278 Ga. 614, 604 S. E. 2d 835, 836 (2004). The Supreme Court of Georgia acknowledged this Court's holding in *Matlock,* 415 U. S. 164, that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared," *id.*, at 170, and found *Matlock* distinguishable just because Scott Randolph was not "absent" from the colloquy on which the police relied for consent to make the search. The State Supreme Court stressed that the officers in *Matlock* had not been "faced with the physical presence of joint occupants, with one consenting to the search and the other objecting." 278 Ga., at 615, 604 S. E. 2d, at 837. It held that an individual who chooses to live with another assumes a risk no greater than "'an inability to control access to the premises during [his] absence,'" *ibid.* (quoting 3 W. LaFave, Search and Seizure § 8.3(d), p. 731 (3d ed. 1996) (hereinafter LaFave)), and does not contemplate that his objection to a request to search commonly shared premises, if made, will be overlooked.

We granted certiorari to resolve a split of authority on whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search.[1] 544 U. S. 973 (2005). We now affirm.

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[1] All four Courts of Appeals to have considered this question have concluded that consent remains effective in the face of an express objection. See *United States* v. *Morning,* 64 F. 3d 531, 533–536 (CA9 1995); *United States* v. *Donlin,* 982 F. 2d 31, 33 (CA1 1992); *United States* v. *Hendrix,*

## II

To the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable *per se*, *Payton* v. *New York*, 445 U. S. 573, 586 (1980); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 454–455 (1971), one "jealously and carefully drawn" exception, *Jones* v. *United States*, 357 U. S. 493, 499 (1958), recognizes the validity of searches with the voluntary consent of an individual possessing authority, *Rodriguez*, 497 U. S., at 181. That person might be the householder against whom evidence is sought, *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 222 (1973), or a fellow occupant who shares common authority over property, when the suspect is absent, *Matlock*, *supra*, at 170, and the exception for consent extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant, *Rodriguez*, *supra*, at 186. None of our co-occupant consent-to-search cases, however, has presented the further fact of a second occupant physically present and refusing permission to search, and later moving to suppress evidence so obtained.[2] The significance of such a refusal turns on the underpinnings of the co-occupant consent rule, as recognized since *Matlock*.

### A

The defendant in that case was arrested in the yard of a house where he lived with a Mrs. Graff and several of her

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595 F. 2d 883, 885 (CADC 1979) *(per curiam)*; *United States* v. *Sumlin*, 567 F. 2d 684, 687–688 (CA6 1977). Of the state courts that have addressed the question, the majority have reached that conclusion as well. See, *e. g.*, *Love* v. *State*, 355 Ark. 334, 342, 138 S. W. 3d 676, 680 (2003); *Laramie* v. *Hysong*, 808 P. 2d 199, 203–205 (Wyo. 1991); but cf. *State* v. *Leach*, 113 Wash. 2d 735, 744, 782 P. 2d 1035, 1040 (1989) (en banc) (requiring consent of all present co-occupants).

[2] Mindful of the multiplicity of living arrangements, we vary the terms used to describe residential co-occupancies. In so doing we do not mean, however, to suggest that the rule to be applied to them is similarly varied.

relatives, and was detained in a squad car parked nearby. When the police went to the door, Mrs. Graff admitted them and consented to a search of the house. 415 U. S., at 166. In resolving the defendant's objection to use of the evidence taken in the warrantless search, we said that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *Id.*, at 170. Consistent with our prior understanding that Fourth Amendment rights are not limited by the law of property, cf. *Katz* v. *United States*, 389 U. S. 347, 352–353 (1967), we explained that the third party's "common authority" is not synonymous with a technical property interest:

> "The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." 415 U. S., at 171, n. 7 (citations omitted).

See also *Frazier* v. *Cupp*, 394 U. S. 731, 740 (1969) ("[I]n allowing [his cousin to share use of a duffel bag] and in leaving it in his house, [the suspect] must be taken to have assumed the risk that [the cousin] would allow someone else to look inside"). The common authority that counts under the Fourth Amendment may thus be broader than the rights accorded by property law, see *Rodriguez, supra*, at 181–182 (consent is sufficient when given by a person who reasonably appears to have common authority but who, in fact, has no property interest in the premises searched), although its limits, too, reflect specialized tenancy arrangements apparent to the police, see *Chapman* v. *United States*, 365 U. S.

610 (1961) (landlord could not consent to search of tenant's home).

The constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules. Cf. *Rakas* v. *Illinois*, 439 U. S. 128, 144, n. 12 (1978) (an expectation of privacy is reasonable if it has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society"). *Matlock* accordingly not only holds that a solitary co-inhabitant may sometimes consent to a search of shared premises, but stands for the proposition that the reasonableness of such a search is in significant part a function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interests.

## B

*Matlock*'s example of common understanding is readily apparent. When someone comes to the door of a domestic dwelling with a baby at her hip, as Mrs. Graff did, she shows that she belongs there, and that fact standing alone is enough to tell a law enforcement officer or any other visitor that if she occupies the place along with others, she probably lives there subject to the assumption tenants usually make about their common authority when they share quarters. They understand that any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another. As *Matlock* put it, shared tenancy is understood to include an "assumption of risk," on which police officers are entitled to rely, and although some group living together might make an exceptional arrangement that no one could admit a guest without the agreement of all, the chance of such an eccentric scheme is too remote to expect visitors to investigate a particular household's rules before accepting an invitation to come in. So, *Matlock* relied on what was usual and placed no burden on the police to eliminate the possibility of atypical arrangements, in the absence of reason to doubt that the regular scheme was in place.

It is also easy to imagine different facts on which, if known, no common authority could sensibly be suspected. A person on the scene who identifies himself, say, as a landlord or a hotel manager calls up no customary understanding of authority to admit guests without the consent of the current occupant. See *Chapman* v. *United States*, *supra* (landlord); *Stoner* v. *California*, 376 U. S. 483 (1964) (hotel manager). A tenant in the ordinary course does not take rented premises subject to any formal or informal agreement that the landlord may let visitors into the dwelling, *Chapman*, *supra*, at 617, and a hotel guest customarily has no reason to expect the manager to allow anyone but his own employees into his room, see *Stoner*, *supra*, at 489; see also *United States* v. *Jeffers*, 342 U. S. 48, 51 (1951) (hotel staff had access to room for purposes of cleaning and maintenance, but no authority to admit police). In these circumstances, neither state-law property rights, nor common contractual arrangements, nor any other source points to a common understanding of authority to admit third parties generally without the consent of a person occupying the premises. And when it comes to searching through bureau drawers, there will be instances in which even a person clearly belonging on premises as an occupant may lack any perceived authority to consent; "a child of eight might well be considered to have the power to consent to the police crossing the threshold into that part of the house where any caller, such as a pollster or salesman, might well be admitted," 4 LaFave § 8.4(c), at 207 (4th ed. 2004), but no one would reasonably expect such a child to be in a position to authorize anyone to rummage through his parents' bedroom.

## C

Although we have not dealt directly with the reasonableness of police entry in reliance on consent by one occupant subject to immediate challenge by another, we took a step toward the issue in an earlier case dealing with the Fourth Amendment rights of a social guest arrested at premises the police entered without a warrant or the benefit of any exception to the warrant requirement. *Minnesota* v. *Olson*, 495 U. S. 91 (1990), held that overnight houseguests have a legitimate expectation of privacy in their temporary quarters because "it is unlikely that [the host] will admit someone who wants to see or meet with the guest over the objection of the guest," *id.*, at 99. If that customary expectation of courtesy or deference is a foundation of Fourth Amendment rights of a houseguest, it presumably should follow that an inhabitant of shared premises may claim at least as much, and it turns out that the co-inhabitant naturally has an even stronger claim.

To begin with, it is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, "stay out." Without some very good reason, no sensible person would go inside under those conditions. Fear for the safety of the occupant issuing the invitation, or of someone else inside, would be thought to justify entry, but the justification then would be the personal risk, the threats to life or limb, not the disputed invitation.[3]

The visitor's reticence without some such good reason would show not timidity but a realization that when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority. Unless the people living together fall within some recognized hierarchy, like a household of parent and child or barracks housing military personnel of different grades, there is no societal understanding of superior and inferior, a fact reflected in a standard formulation of domestic property law, that "[e]ach cotenant . . . has the right to use and enjoy the entire property as if he or she were the sole owner, limited only by the same right in the other cotenants." 7 R. Powell, Powell on Real Property § 50.03[1], p. 50–14 (M. Wolf gen. ed. 2005). The want of any recognized superior authority among disagreeing tenants is also reflected in the law's response when the disagreements cannot be resolved. The law does not ask who has the better side of the conflict; it simply provides a right to any co-tenant, even the most unreasonable, to obtain a decree partitioning the property (when the relationship is one of co-ownership) and terminating the relationship. See, *e. g.*, 2 H. Tiffany, Real Property §§ 468, 473, 474, pp. 297, 307–309 (3d ed. 1939 and 2006 Cum. Supp.). And while a decree of partition is not the answer to disagreement among rental tenants, this situation resembles co-ownership in lacking the benefit of any understanding that one or the other rental co-tenant has a superior claim to control the use of the quarters they occupy together. In sum, there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders.

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[3] Cf. *Mincey* v. *Arizona*, 437 U. S. 385, 393 (1978) (acknowledging the right of police to respond to emergency situations "threatening life or limb" and indicating that police may conduct a warrantless search provided that the search is " 'strictly circumscribed by the exigencies which justify its initiation' ").

### D

Since the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all. Accordingly, in the balancing of competing individual and governmental interests entailed by the bar to unreasonable searches, *Camara* v. *Municipal Court of City and County of San Francisco,* 387 U. S. 523, 536–537 (1967), the cooperative occupant's invitation adds nothing to the government's side to counter the force of an objecting individual's claim to security against the government's intrusion into his dwelling place. Since we hold to the "centuries-old principle of respect for the privacy of the home," *Wilson* v. *Layne,* 526 U. S. 603, 610 (1999), "it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people," *Minnesota* v. *Carter,* 525 U. S. 83, 99 (1998) (KENNEDY, J., concurring). We have, after all, lived our whole national history with an understanding of "the ancient adage that a man's house is his castle [to the point that t]he poorest man may in his cottage bid defiance to all the forces of the Crown," *Miller* v. *United States,* 357 U. S. 301, 307 (1958) (internal quotation marks omitted).[4]

Disputed permission is thus no match for this central value of the Fourth Amendment, and the State's other countervailing claims do not add up to outweigh it.[5] Yes, we recognize the consenting tenant's interest as a citizen in bringing criminal activity to light, see *Coolidge,* 403 U. S., at 488 ("[I]t is no part of the policy underlying the Fourth . . . Amendmen[t] to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals"). And we understand a co-tenant's legitimate self-interest in siding with the police to deflect suspicion raised by sharing quarters with a criminal, see 4 LaFave § 8.3(d), at 162, n. 72 ("The risk of being convicted of possession of drugs one knows are present and has tried to get the other occupant to remove is by no means insignificant"); cf. *Schneckloth,* 412 U. S., at 243 (evidence obtained pursuant to a consent search "may insure that a wholly innocent person is not wrongly charged with a criminal offense").

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[4] In the principal dissent's view, the centuries of special protection for the privacy of the home are over. The dissent equates inviting the police into a co-tenant's home over his contemporaneous objection with reporting a secret, *post,* at 142 (opinion of ROBERTS, C. J.), and the emphasis it places on the false equation suggests a deliberate intent to devalue the importance of the privacy of a dwelling place. The same attitude that privacy of a dwelling is not special underlies the dissent's easy assumption that privacy shared with another individual is privacy waived for all purposes including warrantless searches by the police. *Post,* at 131.

[5] A generalized interest in expedient law enforcement cannot, without more, justify a warrantless search. See *Mincey, supra,* at 393 ("[T]he privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law"); *Coolidge* v. *New Hampshire,* 403 U. S. 443, 481 (1971) ("The warrant requirement . . . is not an inconvenience to be somehow 'weighed' against the claims of police efficiency").

But society can often have the benefit of these interests without relying on a theory of consent that ignores an inhabitant's refusal to allow a warrantless search. The co-tenant acting on his own initiative may be able to deliver evidence to the police, *Coolidge, supra,* at 487–489 (suspect's wife retrieved his guns from the couple's house and turned them over to the police), and can tell the police what he knows, for use before a magistrate in getting a warrant.[6] The reliance

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[6] Sometimes, of course, the very exchange of information like this in front of the objecting inhabitant may render consent irrelevant by creating an exigency that justifies immediate action on the police's part; if the objecting tenant cannot be incapacitated from destroying easily disposable evidence during the time required to get a warrant, see *Illinois* v. *McArthur,* 531 U. S. 326, 331–332 (2001) (denying suspect access to his trailer home while police applied for a search warrant), a fairly perceived need to act on the spot to preserve evidence may justify entry and search under the exigent circumstances exception to the warrant requirement, cf. *Schmerber* v. *California,* 384 U. S. 757, 770–771 (1966) (warrantless search permitted when "the delay necessary to obtain a warrant . . . threatened the destruction of evidence" (internal quotation marks omitted)).

Additional exigent circumstances might justify warrantless searches. See, *e. g., Warden, Md. Penitentiary* v. *Hayden,* 387 U. S. 294, 298 (1967) (hot pursuit); *Chimel* v. *California,* 395 U. S. 752 (1969) (protecting the safety of the police officers); *Michigan* v. *Tyler,* 436 U. S. 499 (1978) (immion a co-tenant's information instead of disputed consent accords with the law's general partiality toward "police action taken under a warrant [as against] searches and seizures without one," *United States* v. *Ventresca*, 380 U. S. 102, 107 (1965); "the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers," *United States* v. *Lefkowitz*, 285 U. S. 452, 464 (1932).

Nor should this established policy of Fourth Amendment law be undermined by the principal dissent's claim that it shields spousal abusers and other violent co-tenants who will refuse to allow the police to enter a dwelling when their victims ask the police for help, *post*, at 138 (opinion of ROBERTS, C. J.) (hereinafter the dissent). It is not that the dissent exaggerates violence in the home; we recognize that domestic abuse is a serious problem in the United States. See U. S. Dept. of Justice, National Institute of Justice, P. Tjaden & N. Thoennes, Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women 25–26 (2000) (noting that over 20 million women and 6 million men will, in the course of their lifetimes, be the victims of intimate-partner abuse); U. S. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Costs of Intimate Partner Violence Against Women in the United States 19 (2003) (finding that nearly 5.3 million intimate-partner victimizations, which result in close to 2 million injuries and 1,300 deaths, occur among women in the United States each year); U. S. Dept. of Justice, Bureau of Justice Statistics, Crime Data Brief, C. Rennison, Intimate Partner Violence, 1993–2001 (Feb. 2003) (noting that in 2001 intimate-partner violence made up 20% of violent crime against women); see also Becker, The Politics of Women's

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nent destruction to building); *Johnson* v. *United States*, 333 U. S. 10, 15 (1948) (likelihood that suspect will imminently flee).

Wrongs and the Bill of "Rights": A Bicentennial Perspective, 59 U. Chi. L. Rev. 453, 507–508 (1992) (noting that women may feel physical insecurity in their homes as a result of abuse from domestic partners).

But this case has no bearing on the capacity of the police to protect domestic victims. The dissent's argument rests on the failure to distinguish two different issues: when the police may enter without committing a trespass, and when the police may enter to search for evidence. No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected. (And since the police would then be lawfully in the premises, there is no question that they could seize any evidence in plain view or take further action supported by any consequent probable cause, see *Texas* v. *Brown*, 460 U. S. 730, 737–739 (1983) (plurality opinion).) Thus, the question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes. See 4 LaFave §8.3(d), at 161 ("[E]ven when . . . two persons quite clearly have equal rights in the place, as where two individuals are sharing an apartment on an equal basis, there may nonetheless sometimes exist a basis for giving greater recognition to the interests of one over the other. . . . [W]here the defendant has victimized the third-party . . . the emergency nature of the situation is such that the third-party consent should validate a warrantless search despite defendant's objections" (internal quotation marks omitted; third omission in original)). The undoubted right of the police to enter in order to protect a victim, however, has nothing to do with the question in this case, whether a search with the consent of one co-tenant is good against another, standing at the door and expressly refusing consent.[7]

None of the cases cited by the dissent support its improbable view that recognizing limits on merely evidentiary searches would compromise the capacity to protect a fearful occupant. In the circumstances of those cases, there is no danger that the fearful occupant will be kept behind the closed door of the house simply because the abusive tenant refuses to consent to a search. See *United States* v. *Donlin*, 982 F. 2d 31, 32 (CA1 1992) (victimized individual was already outside of her apartment when police arrived and, for all intents and purposes, within the protective custody of law enforcement officers); *United States* v. *Hendrix*, 595 F. 2d 883, 885–886 (CADC 1979) *(per curiam)* (even if the consent of the threatened co-occupant did not justify a warrantless search, the police entry was nevertheless allowable on exigent circumstances grounds); *People* v. *Sanders*, 904 P. 2d 1311, 1313–1315 (Colo. 1995) (en banc) (victimized individual gave her consent to search away from her home and was not present at the time of the police visit; alternatively, exigent circumstances existed to satisfy the warrantless exception); *Brandon* v. *State*, 778 P. 2d 221, 223–224 (Alaska App. 1989) (victimized individual consented away from her home and was not present at the time of the police visit); *United States* v. *Davis*, 290 F. 3d 1239, 1241 (CA10 2002) (immediate harm extinguished after husband "order[ed]" wife out of the home).

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[7] We understand the possibility that a battered individual will be afraid to express fear candidly, but this does not seem to be a reason to think such a person would invite the police into the dwelling to search for evidence against another. Hence, if a rule crediting consent over denial of consent were built on hoping to protect household victims, it would distort the Fourth Amendment with little, if any, constructive effect on domestic abuse investigations.

The dissent's red herring aside, we know, of course, that alternatives to disputed consent will not always open the door to search for evidence that the police suspect is inside. The consenting tenant may simply not disclose enough information, or information factual enough, to add up to a showing of probable cause, and there may be no exigency to justify fast action. But nothing in social custom or its reflection in private law argues for placing a higher value on delving into private premises to search for evidence in the face of disputed consent, than on requiring clear justification before the government searches private living quarters over a resident's objection. We therefore hold that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.[8]

### E

There are two loose ends, the first being the explanation given in *Matlock* for the constitutional sufficiency of a cotenant's consent to enter and search: it "rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right . . . ." 415 U. S., at 171, n. 7. If *Matlock*'s co-tenant is giving permission "in his own right," how can his "own right" be eliminated by another tenant's objection? The answer appears in the very footnote from which the quoted statement is taken: the "right" to admit the police to which *Matlock* refers is not an enduring and enforceable ownership right as understood by the private law of property, but is instead the authority recognized by customary social usage as having a substantial bearing on Fourth Amendment reasonableness in specific circumstances. Thus, to ask whether the consenting tenant has the right to admit the police when a physically present fellow tenant objects is not to question whether some property right may be divested by the mere objection of another. It is, rather, the question whether customary social understanding accords the consenting tenant authority powerful enough to prevail over the co-tenant's objection. The *Matlock* Court did not purport to answer this question, a point made clear by another statement (which the dissent does not quote): the Court described the co-tenant's consent as good against "the absent, nonconsenting" resident. *Id.,* at 170.

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[8] The dissent is critical that our holding does not pass upon the constitutionality of such a search as to a third tenant against whom the government wishes to use evidence seized after a search with consent of one co-tenant subject to the contemporaneous objection of another, *post,* at 137. We decide the case before us, not a different one.

The second loose end is the significance of *Matlock* and *Rodriguez* after today's decision. Although the *Matlock* defendant was not present with the opportunity to object, he was in a squad car not far away; the *Rodriguez* defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant. If those cases are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.

This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it. For the very reason that *Rodriguez* held it would be unjustifiably impractical to require the police to take affirmative steps to confirm the actual authority of a consenting individual whose authority was apparent, we think it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting cotenant before acting on the permission they had already received. There is no ready reason to believe that efforts to invite a refusal would make a difference in many cases, whereas every co-tenant consent case would turn into a test about the adequacy of the police's efforts to consult with a potential objector. Better to accept the formalism of distinguishing *Matlock* from this case than to impose a requirement, time consuming in the field and in the courtroom, with no apparent systemic justification. The pragmatic decision to accept the simplicity of this line is, moreover, supported by the substantial number of instances in which suspects who are asked for permission to search actually consent,[9] albeit imprudently, a fact that undercuts any argument that the police should try to locate a suspected inhabitant because his denial of consent would be a foregone conclusion.

## III

This case invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant. Scott Randolph's refusal is clear, and nothing in the record justifies the search on grounds independent of Janet Randolph's consent. The State does not argue that she gave any indication to the police of a need for protection inside the house that might have justified entry into the portion of the premises where the police found the powdery straw (which, if lawfully seized, could have been used when attempting to establish probable cause for the warrant issued later). Nor does the State claim that the entry and search should be upheld under the rubric of exigent circumstances, owing to some apprehension by the police officers that Scott Randolph would destroy evidence of drug use before any warrant could be obtained.

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[9] See 4 LaFave §8.1, at 4 ("The so-called consent search is frequently relied upon by police as a means of investigating suspected criminal conduct" (footnote omitted)); Strauss, Reconstructing Consent, 92 J. Crim. L. & C. 211, 214 (2001–2002) ("Although precise figures detailing the number of searches conducted pursuant to consent are not—and probably can never be—available, there is no dispute that these type of searches affect tens of thousands, if not hundreds of thousands, of people every year" (footnote omitted)).

The judgment of the Supreme Court of Georgia is therefore affirmed.

*It is so ordered.*

JUSTICE ALITO took no part in the consideration or decision of this case.

JUSTICE STEVENS, concurring.

The study of history for the purpose of ascertaining the original understanding of constitutional provisions is much like the study of legislative history for the purpose of ascertaining the intent of the lawmakers who enact statutes. In both situations the facts uncovered by the study are usually relevant but not necessarily dispositive. This case illustrates why even the most dedicated adherent to an approach to constitutional interpretation that places primary reliance on the search for original understanding would recognize the relevance of changes in our society.

At least since 1604 it has been settled that in the absence of exigent circumstances, a government agent has no right to enter a "house" or "castle" unless authorized to do so by a valid warrant. See *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K. B.). Every occupant of the home has a right—protected by the common law for centuries and by the Fourth Amendment since 1791—to refuse entry. When an occupant gives his or her consent to enter, he or she is waiving a valuable constitutional right. To be sure that the waiver is voluntary, it is sound practice—a practice some Justices of this Court thought necessary to make the waiver voluntary[1]—for the officer to advise the occupant of that right.[2] The issue in this case relates to the content of the advice that the officer should provide when met at the door by a man and a woman who are apparently joint tenants or joint owners of the property.

In the 18th century, when the Fourth Amendment was adopted, the advice would have been quite different from what is appropriate today. Given the then-prevailing dramatic differences between the property rights of the husband and the far lesser rights of the wife, only the consent of the husband would matter. Whether "the master of the house" consented or objected, his decision would control. Thus if "original understanding" were to govern the outcome of this case, the search was clearly invalid because the husband did not consent. History, however, is not dispositive because it is now clear, as a matter of constitutional law, that the male and the female are equal partners. *Reed* v. *Reed,* 404 U. S. 71 (1971).

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[1] See, *e. g.*, *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 284–285 (1973) (Marshall, J., dissenting) (pointing out that it is hard to comprehend "how a decision made without knowledge of available alternatives can be treated as a choice at all," and arguing that "[i]f consent to search means that a person has chosen to forgo his right to exclude the police from the place they seek to search, it follows that his consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police").

[2] Such advice is surely preferable to an officer's expression of his or her desire to enter and to search in words that may be construed either as a command or a question. See *id.*, at 275–276 (Douglas, J., dissenting) (noting that "'[u]nder many circumstances a reasonable person might read an officer's "May I" as the courteous expression of a demand backed by force of law'" (quoting *Bustamonte* v. *Schneckloth*, 448 F. 2d 699, 701 (CA9 1971))).

In today's world the only advice that an officer could properly give should make it clear that each of the partners has a constitutional right that he or she may independently assert or waive. Assuming that both spouses are competent, neither one is a master possessing the power to override the other's constitutional right to deny entry to their castle.

With these observations, I join the Court's opinion.

JUSTICE BREYER, concurring.

If Fourth Amendment law forced us to choose between two bright-line rules, (1) a rule that always found one tenant's consent sufficient to justify a search without a warrant and (2) a rule that never did, I believe we should choose the first. That is because, as THE CHIEF JUSTICE's dissent points out, a rule permitting such searches can serve important law enforcement needs (for example, in domestic abuse cases), and the consenting party's joint tenancy diminishes the objecting party's reasonable expectation of privacy.

But the Fourth Amendment does not insist upon bright-line rules. Rather, it recognizes that no single set of legal rules can capture the ever-changing complexity of human life. It consequently uses the general terms "unreasonable searches and seizures." And this Court has continuously emphasized that "[r]easonableness . . . is measured . . . by examining the totality of the circumstances." *Ohio* v. *Robinette,* 519 U. S. 33, 39 (1996); see also *Illinois* v. *Wardlow,* 528 U. S. 119, 136 (2000) (STEVENS, J., concurring in part and dissenting in part); *Florida* v. *Bostick,* 501 U. S. 429, 439 (1991); *Michigan* v. *Chesternut,* 486 U. S. 567, 572–573 (1988); *Florida* v. *Royer,* 460 U. S. 491, 506 (1983) (plurality opinion).

The circumstances here include the following: The search at issue was a search solely for evidence. The objecting party was present and made his objection known clearly and directly to the officers seeking to enter the house. The officers did not justify their search on grounds of possible evidence destruction. Cf. *Thornton* v. *United States,* 541 U. S. 615, 620–622 (2004); *Skinner* v. *Railway Labor Executives' Assn.,* 489 U. S. 602, 623 (1989); *Schmerber* v. *California,* 384 U. S. 757, 770–771 (1966). And, as far as the record reveals, the officers might easily have secured the premises and sought a warrant permitting them to enter. See *Illinois* v. *McArthur,* 531 U. S. 326 (2001). Thus, the "totality of the circumstances" present here do not suffice to justify abandoning the Fourth Amendment's traditional hostility to police entry into a home without a warrant.

I stress the totality of the circumstances, however, because, were the circumstances to change significantly, so should the result. The Court's opinion does not apply where the objector is not present "and object[ing]." *Ante,* at 121.

Moreover, the risk of an ongoing crime or other exigent circumstance can make a critical difference. Consider, for example, instances of domestic abuse. See *ante,* at 117–118. "Family disturbance calls . . . constitute the largest single category of calls received by police departments each year." Mederer & Gelles, Compassion or Control: Intervention in Cases of Wife Abuse, 4 J. of Interpersonal Violence 25 (Mar. 1989) (emphasis deleted); see also, *e. g.,* Office of the Attorney General, California Criminal Justice Statistics Center, Domestic Violence Related Calls for Assistance, 1987–2003, County by Year, http://ag.ca.gov/cjsc/publications/misc/dvsr/tabs/ 8703.pdf (as visited Mar. 1, 2006, and available in Clerk of Court's case file) (providing data showing that California police received an average of 207,848 domestic violence related calls each year); Cessato, Defenders Against Domestic Abuse, Washington Post, Aug. 25, 2002, p. B8 ("In the District [of Columbia], police report that almost half of roughly 39,000 violent crime calls received in 2000 involved domestic violence"); Zorza, Women Battering: High Costs and the State of the Law, Clearinghouse Review 383, 385 (Special Issue 1994) ("One-third of all police time is spent responding to domestic disturbance calls"). And, law enforcement officers must be able to respond effectively when confronted with the possibility of abuse.

If a possible abuse victim invites a responding officer to enter a home or consents to the officer's entry request, that invitation (or consent) itself could reflect the victim's fear about being left alone with an abuser. It could also indicate the availability of evidence, in the form of an immediate willingness to speak, that might not otherwise exist. In that context, an invitation (or consent) would provide a special reason for immediate, rather than later, police entry. And, entry following invitation or consent by one party ordinarily would be reasonable even in the face of direct objection by the other. That being so, contrary to THE CHIEF JUSTICE's suggestion, *post*, at 139, today's decision will not adversely affect ordinary law enforcement practices.

Given the case-specific nature of the Court's holding, and with these understandings, I join the Court's holding and its opinion.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA joins, dissenting.

The Court creates constitutional law by surmising what is typical when a social guest encounters an entirely atypical situation. The rule the majority fashions does not implement the high office of the Fourth Amendment to protect privacy, but instead provides protection on a random and happenstance basis, protecting, for example, a co-occupant who happens to be at the front door when the other occupant consents to a search, but not one napping or watching television in the next room. And the cost of affording such random protection is great, as demonstrated by the recurring cases in which abused spouses seek to authorize police entry into a home they share with a nonconsenting abuser.

The correct approach to the question presented is clearly mapped out in our precedents: The Fourth Amendment protects privacy. If an individual shares information, papers, *or places* with another, he assumes the risk that the other person will in turn share access to that information or those papers *or places* with the government. And just as an individual who has shared illegal plans or incriminating documents with another cannot interpose an objection when that other person turns the information over to the government, just because the individual happens to be present at the time, so too someone who shares a place with another cannot interpose an objection when that person decides to grant access to the police, simply because the objecting individual happens to be present.

A warrantless search is reasonable if police obtain the voluntary consent of a person authorized to give it. Cooccupants have "assumed the risk that one of their number might permit [a] common area to be searched." *United States* v. *Matlock,* 415 U. S. 164, 171, n. 7 (1974). Just as Mrs. Randolph could walk upstairs, come down, and turn her husband's cocaine straw over to the police, she can consent to police entry and search of what is, after all, her home, too.

## I

In *Illinois* v. *Rodriguez,* 497 U. S. 177 (1990), this Court stated that "[w]hat [a person] is assured by the Fourth Amendment . . . is not that no government search of his house will occur unless he consents; but that no such search will occur that is 'unreasonable.'" *Id.,* at 183. One element that can make a warrantless government search of a home "'reasonable'" is voluntary consent. *Id.,* at 184; *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 219 (1973). Proof of voluntary consent "is not limited to proof that consent was given by the defendant," but the government "may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises." *Matlock, supra,* at 171. Today's opinion creates an exception to this otherwise clear rule: A third-party consent search is unreasonable, and therefore constitutionally impermissible, if the co-occupant against whom evidence is obtained was present and objected to the entry and search.

This exception is based on what the majority describes as "widely shared social expectations" that "when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation." *Ante,* at 111, 113–114. But this fundamental predicate to the majority's analysis gets us nowhere: Does the objecting co-tenant accede to the consenting co-tenant's wishes, or the other way around? The majority's assumption about voluntary accommodation simply leads to the common stalemate of two gentlemen insisting that the other enter a room first.

Nevertheless, the majority is confident in assuming—confident enough to incorporate its assumption into the Constitution—that an invited social guest who arrives at the door of a shared residence, and is greeted by a disagreeable co-occupant shouting "'stay out,'" would simply go away. *Ante,* at 113. The Court observes that "no sensible person would go inside under those conditions," *ibid.,* and concludes from this that the inviting co-occupant has no "authority" to insist on getting her way over the wishes of her co-occupant, *ante,* at 114. But it seems equally accurate to say—based on the majority's conclusion that one does not have a right to prevail over the express wishes of his co-occupant—that the objector has no "authority" to insist on getting *his* way over his co-occupant's wish that her guest be admitted.

The fact is that a wide variety of differing social situations can readily be imagined, giving rise to quite different social expectations. A relative or good friend of one of two feuding roommates might well enter the apartment over the objection of the other roommate. The reason the invitee appeared at the door also affects expectations: A guest who came to celebrate an occupant's birthday, or one who had traveled some distance for a particular reason, might not readily turn away simply because of a roommate's objection. The nature of the place itself is also pertinent: Invitees may react one way if the feuding roommates share one room, differently if there are common areas from which the objecting roommate could readily be expected to absent himself. Altering the numbers might well change the social expectations: Invitees might enter if two of three co-occupants encourage them to do so, over one dissenter.

The possible scenarios are limitless, and slight variations in the fact pattern yield vastly different expectations about whether the invitee might be expected to enter or to go away. Such shifting expectations are not a promising foundation on which to ground a constitutional rule, particularly because the majority has no support for its basic assumption—that an invited guest encountering two disagreeing co-occupants would flee—beyond a hunch about how people would typically act in an atypical situation.

And in fact the Court has not looked to such expectations to decide questions of consent under the Fourth Amendment, but only to determine when a search has occurred and whether a particular person has standing to object to a search. For these latter inquiries, we ask whether a person has a subjective expectation of privacy in a particular place, and whether "the expectation [is] one that society is prepared to recognize as 'reasonable.'" *Katz* v. *United States*, 389 U. S. 347, 361 (1967) (Harlan, J., concurring); see *Minnesota* v. *Olson*, 495 U. S. 91, 95–96, 100 (1990) (extending *Katz* test to standing inquiry). But the social expectations concept has not been applied to all questions arising under the Fourth Amendment, least of all issues of consent. A criminal might have a strong expectation that his longtime confidant will not allow the government to listen to their private conversations, but however profound his shock might be upon betrayal, government monitoring with the confidant's consent is reasonable under the Fourth Amendment. See *United States* v. *White*, 401 U. S. 745, 752 (1971) (plurality opinion).

The majority suggests that "widely shared social expectations" are a "constant element in assessing Fourth Amendment reasonableness," *ante*, at 111 (citing *Rakas* v. *Illinois*, 439 U. S. 128, 144, n. 12 (1978)), but that is not the case; the Fourth Amendment precedents the majority cites refer instead to a "legitimate expectation of *privacy*," *id.*, at 143, n. 12 (emphasis added; internal quotation marks omitted). Whatever social expectation the majority seeks to protect, it is not one of privacy. The very predicate giving rise to the question in cases of shared information, papers, containers, or places is that privacy has been shared with another. Our common social expectations may well be that the other person will not, in turn, share what we have shared with them with another—including the police—but that is the risk we take in sharing. If two friends share a locker and one keeps contraband inside, he might trust that his friend will not let others look inside. But by sharing private space, privacy has "already been frustrated" with respect to the lockermate. *United States* v. *Jacobsen*, 466 U. S. 109, 117 (1984). If two roommates share a computer and one keeps pirated software on a shared drive, he might assume that his roommate will not inform the government. But that person has given up his privacy with respect to his roommate by saving the software on their shared computer.

A wide variety of often subtle social conventions may shape expectations about how we act when another shares with us what is otherwise private, and those conventions go by a variety of labels—courtesy, good manners, custom, protocol, even honor among thieves. The Constitution, however, protects not these but privacy, and once privacy has been shared, the shared information, documents, or places remain private only at the discretion of the confidant.

## II

Our cases reflect this understanding. In *United States* v. *White,* we held that one party to a conversation can consent to government eavesdropping, and statements made by the other party will be admissible at trial. 401 U. S., at 752. This rule is based on privacy: "Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. . . . [I]f he has no doubts, or allays them, or risks what doubt he has, the risk is his." *Ibid.*

The Court has applied this same analysis to objects and places as well. In *Frazier* v. *Cupp,* 394 U. S. 731 (1969), a duffel bag "was being used jointly" by two cousins. *Id.,* at 740. The Court held that the consent of one was effective to result in the seizure of evidence used against both: "[I]n allowing [his cousin] to use the bag and in leaving it in his house, [the defendant] must be taken to have assumed the risk that [his cousin] would allow someone else to look inside." *Ibid.*

As the Court explained in *United States* v. *Jacobsen, supra:*

> "It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information. Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information: 'This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in a third party will not be betrayed.'"

> *Id.*, at 117 (quoting *United States* v. *Miller*, 425 U. S. 435, 443 (1976)).

The same analysis applies to the question whether our privacy can be compromised by those with whom we share common living space. If a person keeps contraband in common areas of his home, he runs the risk that his co-occupants will deliver the contraband to the police. In *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971), Mrs. Coolidge retrieved four of her husband's guns and the clothes he was wearing the previous night and handed them over to police. We held that these items were properly admitted at trial because "when Mrs. Coolidge of her own accord produced the guns and clothes for inspection, . . . it was not incumbent on the police to stop her or avert their eyes." *Id.*, at 489.

Even in our most private relationships, our observable actions and possessions are private at the discretion of those around us. A husband can request that his wife not tell a jury about contraband that she observed in their home or illegal activity to which she bore witness, but it is she who decides whether to invoke the testimonial marital privilege. *Trammel* v. *United States*, 445 U. S. 40, 53 (1980). In *Trammel*, we noted that the former rule prohibiting a wife from testifying about her husband's observable wrongdoing at his say-so "goes far beyond making 'every man's house his castle,' and permits a person to convert his house into 'a den of thieves.'" *Id.*, at 51–52 (quoting 5 J. Bentham, Rationale of Judicial Evidence 340 (1827)).

There is no basis for evaluating physical searches of shared space in a manner different from how we evaluated the privacy interests in the foregoing cases, and in fact the Court has proceeded along the same lines in considering such searches. In *Matlock*, police arrested the defendant in the front yard of a house and placed him in a squad car, and then obtained permission from Mrs. Graff to search a shared bedroom for evidence of Matlock's bank robbery. 415 U. S., at 166. Police certainly could have assumed that Matlock would have objected were he consulted as he sat handcuffed in the squad car outside. And in *Rodriguez,* where Miss Fischer offered to facilitate the arrest of her sleeping boyfriend by admitting police into an apartment she apparently shared with him, 497 U. S., at 179, police might have noted that this entry was undoubtedly contrary to Rodriguez's social expectations. Yet both of these searches were reasonable under the Fourth Amendment because Mrs. Graff had authority, and Miss Fischer apparent authority, to admit others into areas over which they exercised control, despite the almost certain wishes of their *present* co-occupants.

The common thread in our decisions upholding searches conducted pursuant to third-party consent is an understanding that a person "assume[s] the risk" that those who have access to and control over his shared property might consent to a search. *Matlock,* 415 U. S., at 171, n. 7. In *Matlock,* we explained that this assumption of risk is derived from a third party's "joint access or control for most purposes" of shared property. *Ibid.* And we concluded that shared use of property makes it "reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right." *Ibid.*

In this sense, the risk assumed by a joint occupant is comparable to the risk assumed by one who reveals private information to another. If a person has incriminating information, he can keep it private in the face of a request from police to share it, because he has that right under the Fifth Amendment. If a person occupies a house with incriminating information in it, he can keep that information private in the face of a request from police to search the house, because he has that right under the Fourth Amendment. But if he shares the information—or the house—with another, that other can grant access to the police in each instance.[1]

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[1] The majority considers this comparison to be a "false equation," and even discerns "a deliberate intent to devalue the importance of the privacy of a dwelling place." *Ante,* at 115, n. 4. But the differences between the

To the extent a person wants to ensure that his possessions will be subject to a consent search only due to his *own* consent, he is free to place these items in an area over which others do *not* share access and control, be it a private room or a locked suitcase under a bed. Mr. Randolph acknowledged this distinction in his motion to suppress, where he differentiated his law office from the rest of the Randolph house by describing it as an area that "was solely in his control and dominion." App. 3. As to a "common area," however, co-occupants with "joint access or control" may consent to an entry and search. *Matlock*, *supra*, at 171, n. 7.

By emphasizing the objector's presence and noting an occupant's understanding that obnoxious guests might "be admitted in [one's] absence," *ante*, at 111, the majority appears to resurrect an agency theory of consent suggested in our early cases. See *Stoner* v. *California*, 376 U. S. 483, 489 (1964) (stating that a hotel clerk could not consent to a search of a guest's room because the guest had not waived his rights

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majority and this dissent reduce to this: Under the majority's view, police may not enter and search when an objecting co-occupant is *present at the door*, but they *may* do so when he is asleep in the next room; under our view, the co-occupant's consent is effective in both cases. It seems a bit overwrought to characterize the former approach as affording great protection to a man in his castle, the latter as signaling that "the centuries of special protection for the privacy of the home are over." *Ibid.* The Court in *United States* v. *Matlock*, 415 U. S. 164 (1974), drew the same comparison the majority faults today, see *id.*, at 171, n. 7, and the "deliberate intent" the majority ascribes to this dissent is apparently shared by all Courts of Appeals and the great majority of State Supreme Courts to have considered the question, see *ante*, at 108–109, n. 1.

The majority also mischaracterizes this dissent as assuming that "privacy shared with another individual is privacy waived for all purposes including warrantless searches by the police." *Ante*, at 115, n. 4. The point, of course, is not that a person waives his privacy by sharing space with others such that police may enter at will, but that sharing space necessarily entails a limited yielding of privacy *to the person with whom the space is shared*, such that the other person shares authority to consent to a search of the shared space. See *supra*, at 128, 132–136.

"by word or deed, either directly or through an agent"); *Chapman* v. *United States*, 365 U. S. 610, 616–617 (1961). This agency theory is belied by the facts of *Matlock* and *Rodriguez*—both defendants were present but simply not asked for consent—and the Court made clear in those cases that a co-occupant's authority to consent rested not on an absent occupant's delegation of choice to an agent, but on the consenting co-occupant's "joint access or control" of the property. *Matlock, supra,* at 171, n. 7; see *Rodriguez, supra,* at 181; *United States* v. *McAlpine,* 919 F. 2d 1461, 1464, n. 2 (CA10 1990) ("[A]gency analysis [was] put to rest by the Supreme Court's reasoning in *Matlock*").

The law acknowledges that although we might not expect our friends and family to admit the government into common areas, sharing space entails risk. A person assumes the risk that his co-occupants—just as they might report his illegal activity or deliver his contraband to the government—might consent to a search of areas over which they have access and control. See *United States* v. *Karo*, 468 U. S. 705, 726 (1984) (O'Connor, J., concurring in part and concurring in judgment) (finding it a "relatively easy case . . . when two persons share identical, overlapping privacy interests in a particular place, container, or conversation. Here *both* share the power to surrender each other's privacy to a third party").

## III

The majority states its rule as follows: "[A] warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Ante,* at 120.

Just as the source of the majority's rule is not privacy, so too the interest it protects cannot reasonably be described as such. That interest is not protected if a co-owner happens to be absent when the police arrive, in the backyard gardening, asleep in the next room, or listening to music through earphones so that only his co-occupant hears the knock on the door. That the rule is so random in its application confirms that it bears no real relation to the privacy protected by the Fourth Amendment. What the majority's rule protects is not so much privacy as the good luck of a co-owner who just happens to be present at the door when the police arrive. Usually when the development of Fourth Amendment jurisprudence leads to such arbitrary lines, we take it as a signal that the rules need to be rethought. See *California* v. *Acevedo,* 500 U. S. 565, 574, 580 (1991). We should not embrace a rule at the outset that its *sponsors* appreciate will result in drawing fine, formalistic lines. See *ante,* at 121.

Rather than draw such random and happenstance lines—and pretend that the Constitution decreed them—the more reasonable approach is to adopt a rule acknowledging that shared living space entails a limited yielding of privacy to others, and that the law historically permits those to whom we have yielded our privacy to in turn cooperate with the government. Such a rule flows more naturally from our cases concerning Fourth Amendment reasonableness and is logically grounded in the concept of privacy underlying that Amendment.

The scope of the majority's rule is not only arbitrary but obscure as well. The majority repeats several times that a present co-occupant's refusal to permit entry renders the search unreasonable and invalid "as to him." *Ante,* at 106, 120, 122. This implies entry and search would be reasonable "as to" someone else, presumably the consenting co-occupant and any other absent co-occupants. The normal Fourth Amendment rule is that items discovered in plain view are admissible if the officers were legitimately on the premises; if the entry and search were reasonable "as to" Mrs. Randolph, based on her consent, it is not clear why the cocaine straw should not be admissible "as to" Mr. Randolph, as discovered in plain view during a legitimate search "as to" Mrs. Randolph. The majority's differentiation between entry focused on discovering whether domestic violence has occurred (and the consequent authority to seize items in plain view), and entry focused on searching for evidence of other crime, is equally puzzling. See *ante,* at 118–119. This Court has rejected subjective motivations of police officers in assessing Fourth Amendment questions, see *Whren* v. *United States,* 517 U. S. 806, 812–813 (1996), with good reason: The police do not need a particular reason to ask for consent to search, whether for signs of domestic violence or evidence of drug possession.

While the majority's rule protects something random, its consequences are particularly severe. The question presented often arises when innocent co-tenants seek to disassociate or protect themselves from ongoing criminal activity. See, *e. g., United States* v. *Hendrix,* 595 F. 2d 883, 884 (CADC 1979) *(per curiam)* (wife asked police "'to get her baby and take [a] sawed-off shotgun out of her house'"); *People* v. *Cosme,* 48 N. Y. 2d 286, 288–289, 293, 397 N. E. 2d 1319, 1320, 1323 (1979) (woman asked police to remove cocaine and a gun from a shared closet); *United States* v. *Botsch,* 364 F. 2d 542, 547 (CA2 1966). Under the majority's rule, there will be many cases in which a consenting co-occupant's wish to have the police enter is overridden by an objection from another present co-occupant. What does the majority imagine will happen, in a case in which the consenting co-occupant is concerned about the other's criminal activity, once the door clicks shut? The objecting co-occupant may pause briefly to decide whether to destroy any evidence of wrongdoing or to inflict retribution on the consenting co-occupant first, but there can be little doubt that he will attend to both in short order. It is no answer to say that the consenting co-occupant can depart with the police; remember that it is her home, too, and the other co-occupant's very presence, which allowed him to object, may also prevent the consenting co-occupant from doing more than urging the police to enter.

Perhaps the most serious consequence of the majority's rule is its operation in domestic abuse situations, a context in which the present question often arises. See *Rodriguez*, 497 U. S., at 179; *United States* v. *Donlin*, 982 F. 2d 31 (CA1 1992); *Hendrix, supra; People* v. *Sanders*, 904 P. 2d 1311 (Colo. 1995) (en banc); *Brandon* v. *State*, 778 P. 2d 221 (Alaska App. 1989). While people living together might typically be accommodating to the wishes of their co-tenants, requests for police assistance may well come from co-inhabitants who are having a disagreement. The Court concludes that because "no sensible person would go inside" in the face of disputed consent, *ante*, at 113, and the consenting co-tenant thus has "no recognized authority" to insist on the guest's admission, *ante*, at 114, a "police officer [has] no better claim to reasonableness in entering than the officer would have in the absence of any consent at all," *ibid.* But the police officer's superior claim to enter is obvious: Mrs. Randolph did not invite the police to join her for dessert and coffee; the officer's precise purpose in knocking on the door was to assist with a dispute between the Randolphs—one in which Mrs. Randolph felt the need for the protective presence of the police. The majority's rule apparently forbids police from entering to assist with a domestic dispute if the abuser whose behavior prompted the request for police assistance objects.[2]

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[2] In response to this concern, the majority asserts that its rule applies "merely [to] evidentiary searches." *Ante*, at 119. But the fundamental premise of the majority's argument is that an inviting co-occupant has "no recognized authority" to "open the door" over a co-occupant's objection. *Ante*, at 114; see also *ante*, at 106 ("[A] physically present co-occupant's stated refusal to permit *entry* prevails, rendering the warrantless search unreasonable and invalid as to him" (emphasis added)); *ante*, at 113 ("[A] caller standing at the door of shared premises would have no confidence . . . to *enter* when a fellow tenant stood there saying 'stay out'" (emphasis added)); *ante*, at 114 ("[A] disputed invitation, without more, gives a police officer no . . . claim to reasonableness in *entering*" (emphasis added)). The point is that the majority's rule transforms what may have begun as a

The majority acknowledges these concerns, but dismisses them on the ground that its rule can be expected to give rise to exigent situations, and police can then rely on an exigent circumstances exception to justify entry. *Ante,* at 116–117, n. 6. This is a strange way to justify a rule, and the fact that alternative justifications for entry might arise does not show that entry pursuant to consent is unreasonable. In addition, it is far from clear that an exception for emergency entries suffices to protect the safety of occupants in domestic disputes. See, *e. g., United States* v. *Davis,* 290 F. 3d 1239, 1240–1241 (CA10 2002) (finding no exigent circumstances justifying entry when police responded to a report of domestic abuse, officers heard no noise upon arrival, defendant told officers that his wife was out of town, and wife then appeared at the door seemingly unharmed but resisted husband's efforts to close the door).

Rather than give effect to a consenting spouse's authority to permit entry into her house to avoid such situations, the majority again alters established Fourth Amendment rules to defend giving veto power to the objecting spouse. In response to the concern that police might be turned away under its rule before entry can be justified based on exigency, the majority creates a new rule: A "good reason" to enter, coupled with one occupant's consent, will ensure that a police officer is "lawfully in the premises." *Ante,* at 118. As support for this "consent plus a good reason" rule, the majority cites a treatise, which itself refers only to *emergency* entries. *Ibid.* (citing 4 W. LaFave, Search and Seizure § 8.3(d), p. 161 (4th ed. 2004)). For the sake of defending what it concedes are fine, formalistic lines, the ma-

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request for consent to conduct an evidentiary search into something else altogether, by giving veto power over the consenting co-occupant's wishes to an occupant who would exclude the police from *entry.* The majority would afford the now quite vulnerable consenting co-occupant sufficient time to gather her belongings and leave, see *ante,* at 118, apparently putting to one side the fact that it is her castle, too.

jority spins out an entirely new framework for analyzing exigent circumstances. Police may now enter with a "good reason" to believe that "violence (or threat of violence) has just occurred or is about to (or soon will) occur." *Ante,* at 118. And apparently a key factor allowing entry with a "good reason" short of exigency is the very consent of one co-occupant the majority finds so inadequate in the first place.

The majority's analysis alters a great deal of established Fourth Amendment law. The majority imports the concept of "social expectations," previously used only to determine when a search has occurred and whether a particular person has standing to object to a search, into questions of consent. *Ante,* at 111, 113. To determine whether entry and search are reasonable, the majority considers a police officer's subjective motive in asking for consent, which we have otherwise refrained from doing in assessing Fourth Amendment questions. *Ante,* at 118. And the majority creates a new exception to the warrant requirement to justify warrantless entry short of exigency in potential domestic abuse situations. *Ibid.*

Considering the majority's rule is solely concerned with protecting a person who happens to be present at the door when a police officer asks his co-occupant for consent to search, but not one who is asleep in the next room or in the backyard gardening, the majority has taken a great deal of pain in altering Fourth Amendment doctrine, for precious little (if any) gain in privacy. Perhaps one day, as the consequences of the majority's analytic approach become clearer, today's opinion will be treated the same way the majority treats our opinions in *Matlock* and *Rodriguez*—as a "loose end" to be tied up. *Ante,* at 121.

One of the concurring opinions states that if it had to choose between a rule that a co-tenant's consent was valid or a rule that it was not, it would choose the former. *Ante,* at 125 (opinion of BREYER, J.). The concurrence advises, however, that "no single set of legal rules can capture the ever-changing complexity of human life," *ibid.*, and joins what becomes the majority opinion, "[g]iven the case-specific nature of the Court's holding," *ante*, at 127. What the majority establishes, in its own terms, is "*the rule* that a physically present inhabitant's express refusal of consent to a police search *is dispositive* as to him, regardless of the consent of a fellow occupant." *Ante*, at 122–123 (emphasis added). The concurrence joins with the apparent "understandin[g]" that the majority's "rule" is not a rule at all, but simply a "case-specific" holding. *Ante*, at 127 (opinion of BREYER, J.). The end result is a complete lack of practical guidance for the police in the field, let alone for the lower courts.

* * *

Our third-party consent cases have recognized that a person who shares common areas with others "assume[s] the risk that one of their number might permit the common area to be searched." *Matlock*, 415 U. S., at 171, n. 7. The majority reminds us, in high tones, that a man's home is his castle, *ante*, at 115, but even under the majority's rule, it is not his castle if he happens to be absent, asleep in the keep, or otherwise engaged when the constable arrives at the gate. Then it is his co-owner's castle. And, of course, it is not his castle if he wants to consent to entry, but his co-owner objects. Rather than constitutionalize such an arbitrary rule, we should acknowledge that a decision to share a private place, like a decision to share a secret or a confidential document, necessarily entails the risk that those with whom we share may in turn choose to share—for their own protection or for other reasons—with the police.

I respectfully dissent.

JUSTICE SCALIA, dissenting.

I join the dissent of THE CHIEF JUSTICE, but add these few words in response to JUSTICE STEVENS' concurrence.

It is not as clear to me as it is to JUSTICE STEVENS that, at the time the Fourth Amendment was adopted, a police officer could enter a married woman's home over her objection, and could not enter with only her consent. Nor is it clear to me that the answers to these questions depended solely on who owned the house. It is entirely clear, however, that *if* the matter *did* depend solely on property rights, a latter-day alteration of property rights would also produce a latter-day alteration of the Fourth Amendment outcome—without altering the Fourth Amendment itself.

JUSTICE STEVENS' attempted critique of originalism confuses the original import of the Fourth Amendment with the background sources of law to which the Amendment, on its original meaning, referred. From the date of its ratification until well into the 20th century, violation of the Amendment was tied to common-law trespass. See *Kyllo* v. *United States,* 533 U. S. 27, 31–32 (2001); see also *California* v. *Acevedo,* 500 U. S. 565, 581, 583 (1991) (SCALIA, J., concurring in judgment). On the basis of that connection, someone who had power to license the search of a house by a private party could authorize a police search. See 1 Restatement of Torts § 167, and Comment *b* (1934); see also *Williams* v. *Howard,* 110 S. C. 82, 96 S. E. 251 (1918); *Fennemore* v. *Armstrong,* 29 Del. 35, 96 A. 204 (Super. Ct. 1915). The issue of *who* could give such consent generally depended, in turn, on "historical and legal refinements" of property law. *United States* v. *Matlock,* 415 U. S. 164, 171, n. 7 (1974). As property law developed, individuals who previously could not authorize a search might become able to do so, and those who once could grant such consent might no longer have that power. But changes in the law of property to which the Fourth Amendment referred would not alter the Amendment's meaning: that anyone capable of authorizing a search by a private party could consent to a warrantless search by the police.

There is nothing new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change. The Fifth Amendment provides, for instance, that "private property" shall not "be taken for public use, without just compensation"; but it does not purport to define property rights. We have consistently held that "the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips* v. *Washington Legal Foundation,* 524 U. S. 156, 164 (1998) (quoting *Board of Regents of State Colleges* v. *Roth,* 408 U. S. 564, 577 (1972)). The same is true of the Fourteenth Amendment Due Process Clause's protection of "property." See *Castle Rock* v. *Gonzales,* 545 U. S. 748, 756 (2005). This reference to changeable law presents no problem for the originalist. No one supposes that the *meaning* of the Constitution changes as States expand and contract property rights. If it is indeed true, therefore, that a wife in 1791 could not authorize the search of her husband's house, the fact that current property law provides otherwise is no more troublesome for the originalist than the well-established fact that a State must compensate its takings of even those property rights that did not exist at the time of the founding.

In any event, JUSTICE STEVENS' panegyric to the *equal* rights of women under modern property law does not support his conclusion that "[a]ssuming . . . both spouses are competent, neither one is a master possessing the power to override the other's constitutional right to deny entry to their castle." *Ante,* at 125. The issue at hand is what to do when there is a *conflict* between two equals. Now that women have authority to consent, as JUSTICE STEVENS claims men alone once did, it does not follow that the spouse who *refuses* consent should be the winner of the contest. JUSTICE STEVENS could just as well have followed the same historical developments to the opposite conclusion: Now that "the male and the female are equal partners," *ibid.*, and women can consent to a search of their property, men can no longer obstruct their wishes. Men and women are no more "equal" in the majority's regime, where both sexes can veto each other's consent, than on the dissent's view, where both sexes cannot.

Finally, I must express grave doubt that today's decision deserves JUSTICE STEVENS' celebration as part of the forward march of women's equality. Given the usual patterns of domestic violence, how often can police be expected to encounter the situation in which a man urges them to enter the home while a woman simultaneously demands that they stay out? The most common practical effect of today's decision, insofar as the contest between the sexes is concerned, is to give men the power to stop women from allowing police into their homes—which is, curiously enough, *precisely* the power that JUSTICE STEVENS disapprovingly presumes men had in 1791.

JUSTICE THOMAS, dissenting.

The Court has long recognized that "[i]t is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement." *Miranda* v. *Arizona*, 384 U. S. 436, 477–478 (1966). Consistent with this principle, the Court held in *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971), that no Fourth Amendment search occurs where, as here, the spouse of an accused voluntarily leads the police to potential evidence of wrongdoing by the accused. *Id.*, at 486–490. Because *Coolidge* squarely controls this case, the Court need not address whether police could permissibly have conducted a general search of the Randolph home, based on Mrs. Randolph's consent. I respectfully dissent.

In the instant case, Mrs. Randolph told police responding to a domestic dispute that respondent was using a substantial quantity of cocaine. Upon police request, she consented to a general search of her residence to investigate her statements. However, as the Court's recitation of the facts demonstrates, *ante,* at 107, the record is clear that no such general search occurred. Instead, Sergeant Brett Murray asked Mrs. Randolph where the cocaine was located, and she showed him to an upstairs bedroom, where he saw the "piece of cut straw" on a dresser. Corrected Tr. of Motion to Suppression Hearing in Case No. 2001R–699 (Super. Ct. Sumter Cty., Ga., Oct. 3, 2002), pp. 8–9. Upon closer examination, Sergeant Murray observed white residue on the straw, and concluded the straw had been used for ingesting cocaine. *Id.,* at 8. He then collected the straw and the residue as evidence. *Id.,* at 9.

Sergeant Murray's entry into the Randolphs' home at the invitation of Mrs. Randolph to be shown evidence of respondent's cocaine use does not constitute a Fourth Amendment search. Under this Court's precedents, only the action of an agent of the government can constitute a search within the meaning of the Fourth Amendment, because that Amendment "was intended as a restraint upon the activities of *sovereign authority,* and was not intended to be a limitation upon other than governmental agencies." *Burdeau* v. *McDowell,* 256 U. S. 465, 475 (1921) (emphasis added). See also *Coolidge,* 403 U. S., at 487. Applying this principle in *Coolidge,* the Court held that when a citizen leads police officers into a home shared with her spouse to show them evidence relevant to their investigation into a crime, that citizen is not acting as an agent of the police, and thus no Fourth Amendment search has occurred. *Id.,* at 488–498.

Review of the facts in *Coolidge* clearly demonstrates that it governs this case. While the police interrogated Coolidge as part of their investigation into a murder, two other officers were sent to his house to speak with his wife. *Id.,* at 485. During the course of questioning Mrs. Coolidge, the police asked whether her husband owned any guns. *Id.*, at 486. Mrs. Coolidge replied in the affirmative, and offered to retrieve the weapons for the police, apparently operating under the assumption that doing so would help to exonerate her husband. *Ibid.* The police accompanied Mrs. Coolidge to the bedroom to collect the guns, as well as clothing that Mrs. Coolidge told them her husband had been wearing the night of the murder. *Ibid.*

Before this Court, Coolidge argued that the evidence of the guns and clothing should be suppressed as the product of an unlawful search because Mrs. Coolidge was acting as an "'instrument,'" or agent, of the police by complying with a "'demand'" made by them. *Id.*, at 487. The Court recognized that, had Mrs. Coolidge sought out the guns to give to police wholly on her own initiative, "there can be no doubt under existing law that the articles would later have been admissible in evidence." *Ibid.* That she did so in cooperation with police pursuant to their request did not transform her into their agent; after all, "it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." *Id.*, at 488. Because the police were "acting normally and properly" when they asked about any guns, and questioning Mrs. Coolidge about the clothing was "logical and in no way coercive," the Fourth Amendment did not require police to "avert their eyes" when Mrs. Coolidge produced the guns and clothes for inspection.[1] *Id.*, at 488–489.

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[1] Although the Court has described *Coolidge* as a "'third party consent'" case, *United States* v. *Matlock*, 415 U. S. 164, 171 (1974), the Court's opinion, by its own terms, does not rest on its conception of Mrs. Coolidge's authority to consent to a search of her house or the possible relevance of Mr. Coolidge's absence from the scene. *Coolidge*, 403 U. S., at 487 ("[W]e need not consider the petitioner's further argument that Mrs. Coolidge could not or did not 'waive' her husband's constitutional protection against unreasonable searches and seizures"). See also *Walter* v. *United States*,

This case is indistinguishable from *Coolidge*, compelling the conclusion that Mrs. Randolph was not acting as an agent of the police when she admitted Sergeant Murray into her home and led him to the incriminating evidence.[2] Just as Mrs. Coolidge could, of her own accord, have offered her husband's weapons and clothing to the police without implicating the Fourth Amendment, so too could Mrs. Randolph have simply retrieved the straw from the house and given it to Sergeant Murray. Indeed, the majority appears to concede as much. *Ante*, at 116 ("The co-tenant acting on his own initiative may be able to deliver evidence to the police, *Coolidge, supra*, at 487–489 . . . , and can tell the police what he knows, for use before a magistrate in getting a warrant"). Drawing a constitutionally significant distinction between what occurred here and Mrs. Randolph's independent production of the relevant evidence is both inconsistent with *Coolidge* and unduly formalistic.[3]

Accordingly, the trial court appropriately denied respondent's motion to suppress the evidence Mrs. Randolph pro-

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447 U. S. 649, 660–661, n. 2 (1980) (White, J., concurring in part and concurring in judgment) ("Similarly, in *Coolidge* v. *New Hampshire*, the Court held that a wife's voluntary action in turning over to police her husband's guns and clothing did not constitute a search and seizure by the government").

[2] The Courts of Appeals have disagreed over the appropriate inquiry to be performed in determining whether involvement of the police transforms a private individual into an agent or instrument of the police. See *United States* v. *Pervaz*, 118 F. 3d 1, 5–6 (CA1 1997) (summarizing approaches of various Circuits). The similarity between this case and *Coolidge* avoids any need to resolve this broader dispute in the present case.

[3] That Sergeant Murray, unlike the officers in *Coolidge*, may have intended to perform a general search of the house is inconsequential, as he ultimately did not do so; he viewed only those items shown to him by Mrs. Randolph. Nor is it relevant that, while Mrs. Coolidge intended to aid the police in apprehending a criminal because she believed doing so would exonerate her husband, Mrs. Randolph believed aiding the police would implicate her husband.

vided to the police and the evidence obtained as a result of the consequent search warrant. I would therefore reverse the judgment of the Supreme Court of Georgia.

# ARIZONA *v.* CALIFORNIA ET AL.

ON BILL OF COMPLAINT

No. 8, Orig. Decided June 3, 1963—Decree entered March 9, 1964—
Amended decree entered February 28, 1966—Decided and supplemental decree entered January 9, 1979—Decided March
30, 1983—Second supplemental decree entered April
16, 1984—Decided June 19, 2000—Supplemental
decree entered October 10, 2000—Consolidated
decree entered March 27, 2006

Supplemental decree entered.

Opinion reported: 373 U. S. 546; decree reported: 376 U. S. 340; amended decree reported: 383 U. S. 268; opinion and supplemental decree reported: 439 U. S. 419; opinion reported: 460 U. S. 605; second supplemental decree reported: 466 U. S. 144; opinion reported: 530 U. S. 392; supplemental decree reported: 531 U. S. 1.

The final settlement agreements are approved, the joint motion for entry of decree is granted, and the proposed consolidated decree is entered. Frank J. McGarr, Esq., of Downers Grove, Illinois, the Special Master in this case, is hereby discharged with the thanks of the Court.

## CONSOLIDATED DECREE

On January 19, 1953, the Court granted the State of Arizona leave to file a bill of complaint against the State of California and seven of its public agencies, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego. 344 U. S. 919. The United States and the State of Nevada intervened. 344 U. S. 919 (1953) (intervention by the United States); 347 U. S. 985 (1954) (intervention by Nevada). The State of New Mexico and the State of Utah were joined as parties. 350 U. S. 114, 115 (1955). The Court referred the case to George I. Haight, Esquire, and upon his death to Simon H. Rifkind, Esquire, as Special Master. 347 U. S. 986 (1954); 350 U. S.

812 (1955). On January 16, 1961, the Court received and ordered filed the report of Special Master Rifkind. 364 U. S. 940. On June 3, 1963, the Court filed an opinion in the case, 373 U. S. 546, and on March 9, 1964, the Court entered a decree in the case. 376 U. S. 340.

On February 28, 1966, the Court granted the joint motion of the parties to amend Article VI of the decree, and so amended Article VI to extend the time for submission of lists of present perfected rights. 383 U. S. 268.

On January 9, 1979, the Court filed an opinion granting the joint motion for entry of a supplemental decree, entered a supplemental decree, denied in part the motion to intervene of the Fort Mojave Indian Tribe, and otherwise referred the case and the motions to intervene of the Fort Mojave Indian Tribe and the Colorado River Indian Tribes, et al., to Judge Elbert Tuttle as Special Master. 439 U. S. 419, 437. On April 5, 1982, the Court received and ordered filed the report of Special Master Tuttle. 456 U. S. 912. On March 30, 1983, the Court filed an opinion rendering a decision on the several exceptions to the report of the Special Master, approving the recommendation that the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, the Colorado River Indian Tribes, the Quechan Tribe, and the Cocopah Indian Tribe be permitted to intervene, and approving some of his further recommendations and disapproving others, 460 U. S. 605, 609, 615. On April 16, 1984, the Court entered a second supplemental decree implementing that decision. 466 U. S. 144.

On October 10, 1989, the Court granted the motion of the state parties to reopen the decree to determine the disputed boundary claims with respect to the Fort Mojave, Colorado River, and Fort Yuma Indian Reservations. 493 U. S. 886. The case was referred to Robert B. McKay, Esquire, and upon his death to Frank McGarr, Esquire, as Special Master. 493 U. S. 971 (1989); 498 U. S. 964 (1990). On October 4, 1999, the Court received and ordered filed the report of Special Master McGarr. 528 U. S. 803. On June 19, 2000, the Court filed an opinion rendering a decision on the several exceptions to the report of the Special Master, approving the settlements of the parties with respect to the Fort Mojave and Colorado River Indian Reservations and remanding the case to the Special Master with respect to the Fort Yuma Indian Reservation. 530 U. S. 392, 418, 419–420. On October 10, 2000, the Court entered a supplemental decree. 531 U. S. 1.

On June 14, 2005, Special Master McGarr submitted his report recommending approval of the settlements of the federal reserved water rights claim with respect to the Fort Yuma Indian Reservation and a proposed supplemental decree to implement those settlements.

The State of Arizona, the State of California, the Metropolitan Water District of Southern California, Coachella Valley Water District, the United States, and the Quechan Tribe, at the direction of the Court, have filed a joint motion to enter a consolidated decree.

This decree consolidates the substantive provisions of the decrees previously entered in this action at 376 U. S. 340 (1964), 383 U. S. 268 (1966), 439 U. S. 419 (1979), 466 U. S. 144 (1984), and 531 U. S. 1 (2000), implements the settlements of the federal reserved water rights claim for the Fort Yuma Indian Reservation, which the Court has approved this date, and reflects changes in the names of certain parties and Indian reservations. This decree is entered in order to provide a single convenient reference to ascertain the rights and obligations of the parties adjudicated in this original proceeding, and reflects only the incremental changes in the original 1964 decree by subsequent decrees and the settlements of the federal reserved water rights claim for the Fort Yuma Indian Reservation.

Accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED

Except where the text of this decree differs from the previous decrees, this decree does not vacate the previous decrees nor alter any of their substantive provisions, and all mandates, injunctions, obligations, privileges, and requirements of this decree are deemed to remain effective as of the date of their respective entry in the prior decrees. Entry of this decree shall not affect the validity or effect of, nor affect any right or obligation under, any existing statute, regulation, policy, administrative order, contract, or judicial decision or judgment in other actions that references any of the previous decrees, and any such reference shall be construed as a reference to the congruent provisions of this decree.

I. For purposes of this decree:

(A) "Consumptive use" means diversions from the stream less such return flow thereto as is available for consumptive use in the United States or in satisfaction of the Mexican Treaty obligation;

(B) "Mainstream" means the mainstream of the Colorado River downstream from Lee Ferry within the United States, including the reservoirs thereon;

(C) Consumptive use from the mainstream within a State shall include all consumptive uses of water of the mainstream, including water drawn from the mainstream by underground pumping, and including, but not limited to, consumptive uses made by persons, by agencies of that State, and by the United States for the benefit of Indian reservations and other federal establishments within the State;

(D) "Regulatory structures controlled by the United States" refers to Hoover Dam, Davis Dam, Parker Dam, Headgate Rock Dam, Palo Verde Dam, Imperial Dam, Laguna Dam, and all other dams and works on the mainstream now or hereafter controlled or operated by the United States which regulate the flow of water in the mainstream or the diversion of water from the mainstream;

(E) "Water controlled by the United States" refers to the water in Lake Mead, Lake Mohave, Lake Havasu, and all other water in the mainstream below Lee Ferry and within the United States;

(F) "Tributaries" means all stream systems the waters of which naturally drain into the mainstream of the Colorado River below Lee Ferry;

(G) "Perfected right" means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use;

(H) "Present perfected rights" means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act;

(I) "Domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power;

(J) "Annual" and "Year," except where the context may otherwise require, refer to calendar years;

(K) Consumptive use of water diverted in one State for consumptive use in another State shall be treated as if diverted in the State for whose benefit it is consumed.

II. The United States, its officers, attorneys, agents and employees be and they are hereby severally enjoined:

(A) From operating regulatory structures controlled by the United States and from releasing water controlled by the United States other than in accordance with the following order of priority:

(1) For river regulation, improvement of navigation, and flood control;

(2) For irrigation and domestic uses, including the satisfaction of present perfected rights; and

(3) For power;

Provided, however, that the United States may release water in satisfaction of its obligations to the United States of Mexico under the Treaty dated February 3, 1944, without regard to the priorities specified in this subdivision (A);

(B) From releasing water controlled by the United States for irrigation and domestic use in the States of Arizona, California, and Nevada, except as follows:

(1) If sufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy 7,500,000 acre-feet of annual consumptive use in the aforesaid three States, then of such 7,500,000 acre-feet of consumptive use, there shall be apportioned 2,800,000 acre-feet for use in Arizona, 4,400,000 acre-feet for use in California, and 300,000 acre-feet for use in Nevada;

(2) If sufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use in the aforesaid States in excess of 7,500,000 acre-feet, such excess consumptive use is surplus, and 50% thereof shall be apportioned for use in Arizona and 50% for use in California; provided, however, that if the United States so contracts with Nevada, then 46% of such surplus shall be apportioned for use in Arizona and 4% for use in Nevada;

(3) If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,000 acre-feet in the aforesaid three States, then the Secretary of the Interior, after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines and after consultation with the parties to major delivery contracts and such representatives as the respective States may designate, may ap-

portion the amount remaining available for consumptive use in such manner as is consistent with the Boulder Canyon Project Act as interpreted by the opinion of this Court herein, and with other applicable federal statutes, but in no event shall more than 4,400,000 acre-feet be apportioned for use in California including all present perfected rights;

(4) Any mainstream water consumptively used within a State shall be charged to its apportionment, regardless of the purpose for which it was released;

(5) Notwithstanding the provisions of Paragraphs (1) through (4) of this subdivision (B), mainstream water shall be released or delivered to water users (including but not limited to public and municipal corporations and other public agencies) in Arizona, California, and Nevada only pursuant to valid contracts therefor made with such users by the Secretary of the Interior, pursuant to Section 5 of the Boulder Canyon Project Act or any other applicable federal statute;

(6) If, in any one year, water apportioned for consumptive use in a State will not be consumed in that State, whether for the reason that delivery contracts for the full amount of the State's apportionment are not in effect or that users cannot apply all of such water to beneficial uses, or for any other reason, nothing in this decree shall be construed as prohibiting the Secretary of the Interior from releasing such apportioned but unused water during such year for consumptive use in the other States. No rights to the recurrent use of such water shall accrue by reason of the use thereof;

(C) From applying the provisions of Article 7(d) of the Arizona water delivery contract dated February 9, 1944, and the provisions of Article 5(a) of the Nevada water delivery contract dated March 30, 1942, as amended by the contract dated January 3, 1944, to reduce the apportionment or delivery of mainstream water to users within the States of Arizona and Nevada by reason of any uses in such States from the tributaries flowing therein;

(D) From releasing water controlled by the United States for use in the States of Arizona, California, and Nevada for the benefit of any federal establishment named in this subdivision (D) except in accordance with the allocations made herein; provided, however, that such release may be made notwithstanding the provisions of Paragraph (5) of subdivision (B) of this Article; and provided further that nothing herein shall prohibit the United States from making future additional reservations of mainstream water for use in any of such States as may be authorized by law and subject to present perfected rights and rights under contracts theretofore made with water users in such State under Section 5 of the Boulder Canyon Project Act or any other applicable federal statute:

(1) The Chemehuevi Indian Reservation in annual quantities not to exceed (i) 11,340 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,900 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of February 2, 1907;

(2) The Cocopah Indian Reservation in annual quantities not to exceed (i) 9,707 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,524 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of September 27, 1917, for lands reserved by the Executive Order of said date; June 24, 1974, for lands reserved by the Act of June 24, 1974 (88 Stat. 266, 269);

(3) The Fort Yuma Indian Reservation in annual quantities not to exceed (i) 77,966 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required

for irrigation of 11,694 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of January 9, 1884;

(4) The Colorado River Indian Reservation in annual quantities not to exceed (i) 719,248 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 107,903 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of March 3, 1865, for lands reserved by the Act of March 3, 1865 (13 Stat. 541, 559); November 22, 1873, for lands reserved by the Executive Order of said date; November 16, 1874, for lands reserved by the Executive Order of said date, except as later modified; May 15, 1876, for lands reserved by the Executive Order of said date; November 22, 1915, for lands reserved by the Executive Order of said date;

(5) The Fort Mojave Indian Reservation in annual quantities not to exceed (i) 132,789 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 20,544 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of September 19, 1890, for lands transferred by the Executive Order of said date; February 2, 1911, for lands reserved by the Executive Order of said date;

(6) The Lake Mead National Recreation Area in annual quantities reasonably necessary to fulfill the purposes of the Recreation Area, with priority dates of May 3, 1929, for lands reserved by the Executive Order of said date (No. 5105), and April 25, 1930, for lands reserved by the Executive Order of said date (No. 5339);

(7) The Havasu Lake National Wildlife Refuge in annual quantities reasonably necessary to fulfill the purposes of the Refuge, not to exceed (i) 41,839 acre-feet of

water diverted from the mainstream or (ii) 37,339 acre-feet of consumptive use of mainstream water, whichever of (i) or (ii) is less, with a priority date of January 22, 1941, for lands reserved by the Executive Order of said date (No. 8647), and a priority date of February 11, 1949, for land reserved by the Public Land Order of said date (No. 559);

(8) The Imperial National Wildlife Refuge in annual quantities reasonably necessary to fulfill the purposes of the Refuge not to exceed (i) 28,000 acre-feet of water diverted from the mainstream or (ii) 23,000 acre-feet of consumptive use of mainstream water, whichever of (i) or (ii) is less, with a priority date of February 14, 1941;

(9) Boulder City, Nevada, as authorized by the Act of September 2, 1958, 72 Stat. 1726, with a priority date of May 15, 1931;

Provided, further, that consumptive uses from the mainstream for the benefit of the above-named federal establishments shall, except as necessary to satisfy present perfected rights in the order of their priority dates without regard to state lines, be satisfied only out of water available, as provided in subdivision (B) of this Article, to each State wherein such uses occur and subject to, in the case of each reservation, such rights as have been created prior to the establishment of such reservation by contracts executed under Section 5 of the Boulder Canyon Project Act or any other applicable federal statute.

III. The States of Arizona, California, and Nevada, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley Water District, the Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego, and all other users of water from the mainstream in said States, their officers, attorneys, agents, and employees, be and they are hereby severally enjoined:

(A) From interfering with the management and operation, in conformity with Article II of this decree, of regulatory structures controlled by the United States;

(B) From interfering with or purporting to authorize the interference with releases and deliveries, in conformity with Article II of this decree, of water controlled by the United States;

(C) From diverting or purporting to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for use in the respective States; provided, however, that no party named in this Article and no other user of water in said States shall divert or purport to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for its particular use;

(D) From consuming or purporting to authorize the consumptive use of water from the mainstream in excess of the quantities permitted under Article II of this decree.

IV. The State of New Mexico, its officers, attorneys, agents, and employees, be and they are after March 9, 1968, hereby severally enjoined:

(A) From diverting or permitting the diversion of water from San Simon Creek, its tributaries, and underground water sources for the irrigation of more than a total of 2,900 acres during any one year, and from exceeding a total consumptive use of such water, for whatever purpose, of 72,000 acre-feet during any period of ten consecutive years; and from exceeding a total consumptive use of such water, for whatever purpose, of 8,220 acre-feet during any one year;

(B) From diverting or permitting the diversion of water from the San Francisco River, its tributaries, and underground water sources for the irrigation within each of the following areas of more than the following number of acres during any one year:

| | |
|---|---|
| Luna Area | 225 |
| Apache Creek-Aragon Area | 316 |
| Reserve Area | 725 |
| Glenwood Area | 1,003 |

and from exceeding a total consumptive use of such water for whatever purpose, of 31,870 acre-feet during any period of ten consecutive years; and from exceeding a total consumptive use of such water, for whatever purpose, of 4,112 acre-feet during any one year;

(C) From diverting or permitting the diversion of water from the Gila River, its tributaries (exclusive of the San Francisco River and San Simon Creek and their tributaries), and underground water sources for the irrigation within each of the following areas of more than the following number of acres during any one year:

| | |
|---|---|
| Upper Gila Area | 287 |
| Cliff-Gila and Buckhorn-Duck Creek Area | 5,314 |
| Red Rock Area | 1,456 |

and from exceeding a total consumptive use of such water (exclusive of uses in Virden Valley, New Mexico), for whatever purpose, of 136,620 acre-feet during any period of ten consecutive years; and from exceeding a total consumptive use of such water (exclusive of uses in Virden Valley, New Mexico), for whatever purpose, of 15,895 acre-feet during any one year;

(D) From diverting or permitting the diversion of water from the Gila River and its underground water sources in the Virden Valley, New Mexico, except for use on lands determined to have the right to the use of such water by the decree entered by the United States District Court for the District of Arizona on June 29, 1935, in *United States* v. *Gila Valley Irrigation District et al.* (Globe Equity No. 59) (herein referred to as the *Gila Decree*), and except pursuant to and in accordance with the terms and provisions of the *Gila Decree;* provided, however, that:

(1) This decree shall not enjoin the use of underground water on any of the following lands:

| Owner | Subdivision and Legal Description | Sec. | Twp. | Rng. | Acreage |
|---|---|---|---|---|---|
| Marvin Arnett and J. C. O'Dell | Part Lot 3 | 6 | 19S | 21W | 33.84 |
| | Part Lot 4 | 6 | 19S | 21W | 52.33 |
| | NW¼ SW¼ | 5 | 19S | 21W | 38.36 |
| | SW¼ SW¼ | 5 | 19S | 21W | 39.80 |
| | Part Lot 1 | 7 | 19S | 21W | 50.68 |
| | NW¼ NW¼ | 8 | 19S | 21W | 38.03 |
| Hyrum M. Pace, Ray Richardson, Harry Day and N. O. Pace, Est. | SW¼ NE¼ | 12 | 19S | 21W | 8.00 |
| | SW¼ NE¼ | 12 | 19S | 21W | 15.00 |
| | SE¼ NE¼ | 12 | 19S | 21W | 7.00 |
| C. C. Martin | S. part SE¼ SW¼ SE¼ | 1 | 19S | 21W | 0.93 |
| | W½ W½ W½ NE¼ NE¼ | 12 | 19S | 21W | 0.51 |
| | NW¼ NE¼ | 12 | 19S | 21W | 18.01 |
| A. E. Jacobson | SW part Lot 1 | 6 | 19S | 21W | 11.58 |
| W. LeRoss Jones | E. Central part: E½ E½ E½ NW¼ NW¼ | 12 | 19S | 21W | 0.70 |
| | SW part NE¼ NW¼ | 12 | 19S | 21W | 8.93 |
| | N. Central part: N½ N½ NW½ SE¼ NW¼ N½ N½ N½ | 12 | 19S | 21W | 0.51 |
| Conrad and James R. Donaldson | SE¼ | 18 | 19S | 20W | 8.00 |
| James D. Freestone | Part W½ NW¼ | 33 | 18S | 21W | 7.79 |
| Virgil W. Jones | N½ SE¼ NW¼; SE¼ NE¼ NW¼ | 12 | 19S | 21W | 7.40 |
| Darrell Brooks | SE¼ SW¼ | 32 | 18S | 21W | 6.15 |
| Floyd Jones | Part N½ SE¼ NE¼ | 13 | 19S | 21W | 4.00 |
| | Part NW¼ SW¼ NW¼ | 18 | 19S | 20W | 1.70 |
| L. M. Hatch | SW¼ SW¼ | 32 | 18S | 21W | 4.40 |
| | Virden Townsite | | | | 3.90 |

| Owner | Subdivision and Legal Description | Sec. | Twp. | Rng. | Acreage |
|---|---|---|---|---|---|
| Carl M. Donaldson | SW¼ SE¼ | 12 | 19S | 21W | 3.40 |
| Mack Johnson | Part NW¼ NW¼ NE¼ | 10 | 19S | 21W | 2.80 |
|  | Part NE¼ NW¼ NE¼ | 10 | 19S | 21W | 0.30 |
|  | Part N½ N½ S½ NW¼ NE¼ | 10 | 19S | 21W | 0.10 |
| Chris Dotz | SE¼ SE¼; SW¼ SE¼ | 3 | 19S | 21W | 2.66 |
|  | NW¼ NE¼; NE¼ NE¼ | 10 | 19S | 21W |  |
| Roy A. Johnson | NE¼ SE¼ SE¼ | 4 | 19S | 21W | 1.00 |
| Ivan and Antone Thygerson | NE¼ SE¼ SE¼ | 32 | 18S | 21W | 1.00 |
| John W. Bonine | SW¼ SE¼ SW¼ | 34 | 18S | 21W | 1.00 |
| Marion K. Mortenson | SW¼ SW¼ SE¼ | 33 | 18S | 21W | 1.00 |
| Total |  |  |  |  | 380.81 |

or on lands or for other uses in the Virden Valley to which such use may be transferred or substituted on retirement from irrigation of any of said specifically described lands, up to a maximum total consumptive use of such water of 838.2 acre-feet per annum, unless and until such uses are adjudged by a court of competent jurisdiction to be an infringement or impairment of rights confirmed by the *Gila Decree;* and

(2) This decree shall not prohibit domestic use of water from the Gila River and its underground water sources on lands with rights confirmed by the *Gila Decree,* or on farmsteads located adjacent to said lands, or in the Virden Townsite, up to a total consumptive use of 265 acre-feet per annum in addition to the uses confirmed by the *Gila Decree,* unless and until such use is adjudged by a court of competent jurisdiction to be an infringement or impairment of rights confirmed by the *Gila Decree;*

(E) Provided, however, that nothing in this Article IV shall be construed to affect rights as between individual water users in the State of New Mexico; nor shall anything in this Article be construed to affect possible superior rights of the United States asserted on behalf of National Forests, Parks, Memorials, Monuments, and lands administered by the Bureau of Land Management; and provided further that in addition to the diversions authorized herein the United States has the right to divert water from the mainstream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the forest within which the water is used;

(F) Provided, further, that no diversion from a stream authorized in Article IV(A) through (D) may be transferred to any of the other streams, nor may any use for irrigation purposes within any area on one of the streams be transferred for use for irrigation purposes to any other area on that stream.

V. The United States shall prepare and maintain, or provide for the preparation and maintenance of, and shall make available, annually and at such shorter intervals as the Secretary of the Interior shall deem necessary or advisable, for inspection by interested persons at all reasonable times and at a reasonable place or places, complete, detailed, and accurate records of:

(A) Releases of water through regulatory structures controlled by the United States;

(B) Diversions of water from the mainstream, return flow of such water to the stream as is available for consumptive use in the United States or in satisfaction of the Mexican Treaty obligation, and consumptive use of such water. These quantities shall be stated separately as to each diverter from the mainstream, each point of diversion, and each of the States of Arizona, California, and Nevada;

(C) Releases of mainstream water pursuant to orders therefor but not diverted by the party ordering the same, and the quantity of such water delivered to Mexico in satisfaction of the Mexican Treaty or diverted by others in satisfaction of rights decreed herein. These quantities shall be stated separately as to each diverter from the mainstream, each point of diversion, and each of the States of Arizona, California, and Nevada;

(D) Deliveries to Mexico of water in satisfaction of the obligations of Part III of the Treaty of February 3, 1944, and, separately stated, water passing to Mexico in excess of treaty requirements;

(E) Diversions of water from the mainstream of the Gila and San Francisco Rivers and the consumptive use of such water, for the benefit of the Gila National Forest.

VI. By March 9, 1967, the States of Arizona, California, and Nevada shall furnish to this Court and to the Secretary of the Interior a list of the present perfected rights, with their claimed priority dates, in waters of the mainstream within each State, respectively, in terms of consumptive use, except those relating to federal establishments. Any named party to this proceeding may present its claim of present perfected rights or its opposition to the claims of others. The Secretary of the Interior shall supply similar information, by March 9, 1967, with respect to the claims of the United States to present perfected rights within each State. If the parties and the Secretary of the Interior are unable at that time to agree on the present perfected rights to the use of mainstream water in each State, and their priority dates, any party may apply to the Court for the determination of such rights by the Court. A list of present perfected rights, with priority dates, in waters of the mainstream in the States of Arizona, California, and Nevada is set forth in Parts I–A, II–A, and III of the Appendix to this decree and is incorporated herein by reference.

VII. The State of New Mexico shall, by March 9, 1968, prepare and maintain, or provide for the preparation and maintenance of, and shall annually thereafter make available for inspection at all reasonable times and at a reasonable place or places, complete, detailed, and accurate records of:

(A) The acreages of all lands in New Mexico irrigated each year from the Gila River, the San Francisco River, San Simon Creek, and their tributaries and all of their underground water sources, stated by legal description and component acreages and separately as to each of the areas designated in Article IV of this decree and as to each of the three streams;

(B) Annual diversions and consumptive uses of water in New Mexico, from the Gila River, the San Francisco River, San Simon Creek, and their tributaries and all their underground water sources, stated separately as to each of the three streams.

VIII. This decree shall not affect:

(A) The relative rights *inter sese* of water users within any one of the States, except as otherwise specifically provided herein;

(B) The rights or priorities to water in any of the Lower Basin tributaries of the Colorado River in the States of Arizona, California, Nevada, New Mexico, and Utah except the Gila River System;

(C) The rights or priorities, except as specific provision is made herein, of any Indian Reservation, National Forest, Park, Recreation Area, Monument or Memorial, or other lands of the United States;

(D) Any issue of interpretation of the Colorado River Compact.

IX. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

## APPENDIX

The present perfected rights to the use of mainstream water in the States of Arizona, California, and Nevada, and their priority dates are determined to be as set forth below, subject to the following:

(1) The following listed present perfected rights relate to the quantity of water which may be used by each claimant and the list is not intended to limit or redefine the type of use otherwise set forth in this decree.

(2) This determination shall in no way affect future adjustments resulting from determinations relating to settlement of Indian reservation boundaries referred to in Article II(D)(5) of this decree.

(3) Article IX of this decree is not affected by this list of present perfected rights.

(4) Any water right listed herein may be exercised only for beneficial uses.

(5) In the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Article II(B)(3) of this decree, the Secretary of the Interior shall, before providing for the satisfaction of any of the other present perfected rights except for those listed herein as "MISCELLANEOUS PRESENT PERFECTED RIGHTS" (rights numbered 7–21 and 29–80 below) in the order of their priority dates without regard to state lines, first provide for the satisfaction in full of all rights of the Chemehuevi Indian Reservation, Cocopah Indian Reservation, Fort Yuma Indian Reservation, Colorado River Indian Reservation, and the Fort Mojave Indian Reservation as set forth in Article II(D)(1)–(5) of this decree, provided that the quantities fixed in paragraphs (1) through (5) of Article II(D) of this decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally deter-

mined except for the western boundaries of the Fort Mojave and Colorado River Indian Reservations in California and except for the boundaries of the Fort Yuma Indian Reservation in Arizona and California. Additional present perfected rights so adjudicated by such adjustment shall be in annual quantities not to exceed the quantities of mainstream water necessary to supply the consumptive use required for irrigation of the practicably irrigable acres which are included within any area determined to be within a reservation by such final determination of a boundary and for the satisfaction of related uses. The quantities of diversions are to be computed by determining net practicably irrigable acres within each additional area using the methods set forth by the Special Master in this case in his report to this Court dated December 5, 1960, and by applying the unit diversion quantities thereto, as listed below:

| Indian Reservation | Unit Diversion Quantity Acre-Feet Per Irrigable Acre |
|---|---|
| Cocopah | 6.37 |
| Colorado River | 6.67 |
| Chemehuevi | 5.97 |
| Ft. Mojave | 6.46 |
| Ft. Yuma | 6.67 |

The foregoing reference to a quantity of water necessary to supply consumptive use required for irrigation, and as that provision is included within paragraphs (1) through (5) of Article II(D) of this decree, shall constitute the means of determining quantity of adjudicated water rights but shall not constitute a restriction of the usage of them to irrigation or other agricultural application. If all or part of the adjudicated water rights of any of the five Indian reservations is used other than for irrigation or other agricultural application, the total consumptive use, as that term is defined in

Article I(A) of this decree, for said reservation shall not exceed the consumptive use that would have resulted if the diversions listed in subparagraph (i) of paragraphs (1) through (5) of Article II(D) of this decree had been used for irrigation of the number of acres specified for that reservation in said paragraphs and for the satisfaction of related uses. Effect shall be given to this paragraph notwithstanding the priority dates of the present perfected rights as listed below. However, nothing in this paragraph (5) shall affect the order in which such rights listed below as "MISCELLANEOUS PRESENT PERFECTED RIGHTS" (numbered 7–21 and 29–80 below) shall be satisfied. Furthermore, nothing in this paragraph shall be construed to determine the order of satisfying any other Indian water rights claims not herein specified.

## I

## ARIZONA

### A. Federal Establishments' Present Perfected Rights

The federal establishments named in Article II, subdivision (D), paragraphs (2), (3), (4), and (5) of this decree, such rights having been decreed in Article II:

| Defined Area of Land | Annual Diversions (Acre-Feet) | Net Acres[1] | Priority Date |
|---|---|---|---|
| 1) Cocopah Indian Reservation | 7,681 | 1,206 | Sept. 27, 1917 |
| 2) Colorado River Indian Reservation | 358,400 | 53,768 | Mar. 3, 1865 |
| | 252,016 | 37,808 | Nov. 22, 1873 |
| | 51,986 | 7,799 | Nov. 16, 1874 |
| 3) Fort Mojave Indian Reservation | 27,969 | 4,327 | Sept. 18, 1890 |
| | 75,566 | 11,691 | Feb. 2, 1911 |
| 3a) Fort Yuma Indian Reservation | 6,350 | 952 | Jan. 9, 1884 |

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[1] The quantity of water in each instance is measured by (i) diversions or (ii) consumptive use required for irrigation of the respective acreage and for satisfaction of related uses, whichever of (i) or (ii) is less.

In addition to the mainstream diversion rights in favor of the Indian reservations specified in Paragraph I(A) of this Appendix, a mainstream diversion right of 2,026 acre-feet for the Cocopah Reservation shall be charged against the State of Arizona with a priority date of June 24, 1974.

### B. Water Projects' Present Perfected Rights

(4) *The Valley Division, Yuma Project* in annual quantities not to exceed (i) 254,200 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 43,562 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901.

(5) *The Yuma Auxiliary Project, Unit B* in annual quantities not to exceed (i) 6,800 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,225 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of July 8, 1905.

(6) *The North Gila Valley Unit, Yuma Mesa Division, Gila Project* in annual quantities not to exceed (i) 24,500 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 4,030 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of July 8, 1905.

### C. Miscellaneous Present Perfected Rights

1. The following miscellaneous present perfected rights in Arizona in annual quantities of water not to exceed the listed acre-feet of diversion from the mainstream to supply the consumptive use required for irrigation and the satisfaction of related uses within the boundaries of the land described and with the priority dates listed:

Appendix to decree

| Defined Area of Land | Annual Diversions (acre-feet) | Priority Date |
|---|---|---|
| 7)<br>160 Acres in Lots 21, 24, and 25, Sec. 29 and Lots 15, 16, 17 and 18, and the SW¼ of the SE¼, Sec. 30, T.16S., R.22E., San Bernardino Base and Meridian, Yuma County, Arizona. (Powers)[2] | 960 | 1915 |
| 8)<br>Lots 11, 12, 13, 19, 20, 22 and S½ of SW¼, Sec. 30, T.16S., R.22E., San Bernardino Base and Meridian, Yuma County, Arizona. (United States)[3] | 1,140 | 1915 |
| 9)<br>60 acres within Lot 2, Sec. 15 and Lots 1 and 2, Sec. 22, T.10N., R.19W., G&SRBM. (Graham)[2] | 360 | 1910 |
| 10)<br>180 acres within the N½ of the S½ and the S½ of the N½ of Sec. 13 and the SW¼ of the NE¼ of Sec. 14, T.18N., R.22W., G&SRBM. (Hulet)[2] | 1,080 | 1902 |
| 11)<br>45 acres within the NE¼ of the SW¼, the SW¼ of the SW¼ and the SE¼ of the SW¼ of Sec. 11, T.18N., R.22W., G&SRBM.<br>80 acres within the N½ of the SW¼ of Sec. 11, T.18N., R.22W., G&SRBM.<br>10 acres within the NW¼ of the NE¼ of the NE¼ of Sec. 15, T.18N., R.22W., G&SRBM.<br>40 acres within the SE¼ of the SE¼ of Sec. 15, T.18N., R.22W., G&SRBM. (Hurschler)[2] | 1,050 | 1902 |
| 12)<br>40 acres within Sec. 13, T.17N., R.22W., G&SRBM. (Miller)[2] | 240 | 1902 |

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[2] The names in parentheses following the description of the "Defined Area of Land" are used for identification of present perfected rights only; the name used is the first name appearing as the Claimants identified with a parcel in Arizona's 1967 list submitted to this Court.

[3] Included as a part of the Powers' claim in Arizona's 1967 list submitted to this Court. Subsequently, the United States and Powers agreed to a Stipulation of Settlement on land ownership whereby title to this property was quieted in favor of the United States.

| Defined Area of Land | Annual Diversions (acre-feet) | Priority Date |
|---|---|---|
| 13)<br>120 acres within Sec. 27, T.18N., R.22W., G&SRBM.<br>15 acres within the NW¼ of the NW¼, Sec. 23, T.18N., R.22W., G&SRBM. (McKellips and Granite Reef Farms)[4] | 810 | 1902 |
| 14)<br>180 acres within the NW¼ of the NE¼, the SW¼ of the NE¼, the NE¼ of the SW¼, the NW¼ of the SE¼, the NE¼ of the SE¼, and the SW¼ of the SE¼, and the SE¼ of the SE¼, Sec. 31, T.18N., R.21W., G&SRBM. (Sherrill & Lafolette)[4] | 1,080 | 1902 |
| 15)<br>53.89 acres as follows:<br>Beginning at a point 995.1 feet easterly of the NW corner of the NE¼ of Sec. 10, T.8S., R.22W., Gila and Salt River Base and Meridian; on the northerly boundary of the said NE¼, which is the true point of beginning, then in a southerly direction to a point on the southerly boundary of the said NE¼ which is 991.2 feet E. of the SW corner of said NE¼ thence easterly along the S. line of the NE¼, a distance of 807.3 feet to a point, thence N. 0°7′ W., 768.8 feet to a point, thence E. 124.0 feet to a point, thence northerly 0°14′ W., 1,067.6 feet to a point, thence E. 130 feet to a point, thence northerly 0°20′ W., 405.2 feet to a point, thence northerly 63°10′ W., 506.0 feet to a point, thence northerly 90°15′ W., 562.9 feet to a point on the northerly boundary of the said NE¼, thence easterly along the said northerly boundary of the said NE¼, 116.6 feet to the true point of the beginning containing 53.89 acres. All as more particularly described and set forth in that survey executed by Thomas A. Yowell, Land Surveyor on June 24, 1969. (Molina)[4] | 318 | 1928 |

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[4] The names in parentheses following the description of the "Defined Area of Land" are the names of claimants, added since the 1967 list, upon whose water use these present perfected rights are predicated.

| Defined Area of Land | Annual Diversions (acre-feet) | Priority Date |
|---|---|---|
| 16)<br>60 acres within the NW¼ of the NW¼ and the north half of the SW¼ of the NW¼ of Sec. 14, T.8S., R.22W., G&SRBM.<br>70 acres within the S½ of the SW¼ of the SW¼, and the W½ of the SW¼, Sec. 14, T.8S., R.22W., G&SRBM. (Sturges)[4] | 780 | 1925 |
| 17)<br>120 acres within the N½ NE¼, NE¼ NW¼, Section 23, T.18N., R.22W., G&SRBM. (Zozaya)[4] | 720 | 1912 |
| 18)<br>40 acres in the W½ of the NE¼ of Section 30, and 60 acres in the W½ of the SE¼ of Section 30, and 60 acres in the E½ of the NW¼ of Section 31, comprising a total of 160 acres all in Township 18 North, Range 21 West of the G&SRBM. (Swan)[4] | 960 | 1902 |
| 19)<br>7 acres in the East 300 feet of the W½ of Lot 1 (Lot 1 being the SE¼ SE¼, 40 acres more or less), Section 28, Township 16 South, Range 22 East, San Bernardino Meridian, lying North of U. S. Bureau of Reclamation levee right of way. EXCEPT that portion conveyed to the United States of America by instrument recorded in Docket 417, page 150 EXCEPTING any portion of the East 300 feet of W½ of Lot 1 within the natural bed of the Colorado River below the line of ordinary high water and also EXCEPTING any artificial accretions waterward of said line of ordinary high water, all of which comprises approximately seven (7) acres. (Milton and Jean Phillips)[4] | 42 | 1900 |

2. The following miscellaneous present perfected rights in Arizona in annual quantities of water not to exceed the listed number of acre-feet of (i) diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use, whichever of (i) or (ii) is less, for domestic,

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*[Footnote 4 is on p. 172]*

municipal, and industrial purposes within the boundaries of the land described and with the priority dates listed:

| Defined Area of Land | Annual Diversions (acre-feet) | Annual Consumptive Use (acre-feet) | Priority Date |
|---|---|---|---|
| 20) City of Parker[2] | 630 | 400 | 1905 |
| 21) City of Yuma[2] | 2,333 | 1,478 | 1893 |

## II

## CALIFORNIA

### A. Federal Establishments' Present Perfected Rights

The federal establishments named in Article II, subdivision (D), paragraphs (1), (3), (4), and (5) of this decree, such rights having been decreed by Article II:

| Defined Area of Land | Annual Diversions (acre-feet)[5] | Net Acres[5] | Priority Date |
|---|---|---|---|
| 22) Chemehuevi Indian Reservation | 11,340 | 1,900 | Feb. 2, 1907 |
| 23) Fort Yuma Indian Reservation | 71,616 | 10,742 | Jan. 9, 1884 |
| 24) Colorado River Indian Reservation | 10,745 | 1,612 | Nov. 22, 1873 |
| | 40,241 | 6,037 | Nov. 16, 1874 |
| | 5,860 | 879 | May 15, 1876 |
| 25) Fort Mojave Indian Reservation | 16,720 | 2,587 | Sept. 18, 1890 |

### B. Water Districts' and Projects' Present Perfected Rights

26)

*The Palo Verde Irrigation District* in annual quantities not to exceed (i) 219,780 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to

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*[Footnote 2 is on p. 171]*

[5] The quantity of water in each instance is measured by (i) diversions or (ii) consumptive use required for irrigation of the respective acreage and for satisfaction of related uses, whichever of (i) or (ii) is less.

supply the consumptive use required for irrigation of 33,604 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1877.

27)

*The Imperial Irrigation District* in annual quantities not to exceed (i) 2,600,000 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901.

28)

*The Reservation Division, Yuma Project, California* (non-Indian portion) in annual quantities not to exceed (i) 38,270 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 6,294 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of July 8, 1905.

### C. Miscellaneous Present Perfected Rights

1. The following miscellaneous present perfected rights in California in annual quantities of water not to exceed the listed number of acre-feet of diversions from the mainstream to supply the consumptive use required for irrigation and the satisfaction of related uses within the boundaries of the land described and with the priority dates listed:

| Defined Area of Land | Annual Diversions (acre-feet) | Priority Date |
|---|---|---|
| 29) | | |
| 130 acres within Lots 1, 2, and 3, SE¼ of NE¼ of Section 27, T.16S., R.22E., S.B.B. & M. (Wavers)[6] | 780 | 1856 |

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[6] The names in parentheses following the description of the "Defined Area of Land" are used for identification of present perfected rights only; the name used is the first name appearing as the claimant identified with a parcel in California's 1967 list submitted to this Court.

| Defined Area of Land | Annual Diversions (acre-feet) | Priority Date |
|---|---|---|
| 30) 40 acres within W½, W½ of E½ of Section 1, T.9N., R.22E., S.B.B. & M. (Stephenson)[6] | 240 | 1923 |
| 31) 20 acres within Lots 1 and 2, Sec. 19, T.13S., R.23E., and Lots 2, 3, and 4 of Sec. 24, T.13S., R.22E., S.B.B. & M. (Mendivil)[6] | 120 | 1893 |
| 32) 30 acres within NW¼ of SE¼, S½ of SE¼, Sec. 24, and NW¼ of NE¼, Sec. 25, all in T.9S., R.21E., S.B.B. & M. (Grannis)[6] | 180 | 1928 |
| 33) 25 acres within Lot 6, Sec. 5; and Lots 1 and 2, SW¼ of NE¼, and NE¼ of SE¼ of Sec. 8, and Lots 1 & 2 of Sec. 9, all in T.13S., R.22E., S.B.B. & M. (Morgan)[6] | 150 | 1913 |
| 34) 18 acres within E½ of NW¼ and W½ of NE¼ of Sec. 14, T.10S., R.21E., S.B.B. & M. (Milpitas)[6] | 108 | 1918 |
| 35) 10 acres within N½ of NE¼, SE¼ of NE¼, and NE¼ of SE¼, Sec. 30, T.9N., R.23E., S.B.B. & M. (Simons)[6] | 60 | 1889 |
| 36) 16 acres within E½ of NW¼ and N½ of SW¼, Sec. 12, T.9N., R.22E., S.B.B. & M. (Colo. R. Sportsmen's League)[6] | 96 | 1921 |
| 37) 11.5 acres within E½ of NW¼, Sec. 1, T.10S., R.21E., S.B.B. & M. (Milpitas)[6] | 69 | 1914 |
| 38) 11 acres within S½ of SW¼, Sec. 12, T.9N., R.22E., S.B.B. & M. (Andrade)[6] | 66 | 1921 |
| 39) 6 acres within Lots 2, 3, and 7 and NE¼ of SW¼, Sec. 19, T.9N., R.23E., S.B.B. & M. (Reynolds)[6] | 36 | 1904 |
| 40) 10 acres within N½ of NE¼, SE¼ of NE¼ and NE¼ of SE¼, Sec. 24, T.9N., R.22E., S.B.B. & M. (Cooper)[6] | 60 | 1905 |

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*[Footnote 6 is on p. 175]*

| Defined Area of Land | Annual Diversions (acre-feet) | Priority Date |
|---|---|---|
| 41) | | |
| 20 acres within SW¼ of SW¼ (Lot 8), Sec. 19, T.9N., R.23E., S.B.B. & M. (Chagnon)[7] | 120 | 1925 |
| 42) | | |
| 20 acres within NE¼ of SW¼, N½ of SE¼, SE¼ of SE¼, Sec. 14, T.9S., R.21E., S.B.B. & M. (Lawrence)[7] | 120 | 1915 |

2. The following miscellaneous present perfected rights in California in annual quantities of water not to exceed the listed number of acre-feet of (i) diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use, whichever of (i) or (ii) is less, for domestic, municipal, and industrial purposes within the boundaries of the land described and with the priority dates listed:

| Defined Area of Land | Annual Diversions (acre-feet) | Annual Consumptive Use (acre-feet) | Priority Date |
|---|---|---|---|
| 43) | | | |
| City of Needles[6] | 1,500 | 950 | 1885 |
| 44) | | | |
| Portions of: Secs. 5, 6, 7 & 8, T.7N., R.24E.; Sec. 1, T.7N., R.23E.; Secs. 4, 5, 9, 10, 15, 22, 23, 25, 26, 35, & 36, T.8N., R.23E.; Secs. 19, 29, 30, 32 & 33, T.9N., R.23E., S.B.B. & M. (Atchison, Topeka and Santa Fe Railway Co.)[6] | 1,260 | 273 | 1896 |
| 45) | | | |
| Lots 1, 2, 3, 4, 5, & SW¼ NW¼ of Sec. 5, T.13S., R.22E., S.B.B. & M. (Conger)[7] | 1.0 | 0.6 | 1921 |

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*[Footnote 6 is on p. 175]*

[7] The names in parentheses following the description of the "Defined Area of Land" are the names of the homesteaders upon whose water use these present perfected rights, added since the 1967 list submitted to this Court, are predicated.

| Defined Area of Land | Annual Diversions (acre-feet) | Annual Consumptive Use (acre-feet) | Priority Date |
|---|---|---|---|
| 46)<br>Lots 1, 2, 3, 4 of Sec. 32, T.11S., R.22E., S.B.B. & M. (G. Draper)[7] | 1.0 | 0.6 | 1923 |
| 47)<br>Lots 1, 2, 3, 4, and SE¼ SW¼ of Sec. 20, T.11S., R.22E., S.B.B. & M. (McDonough)[7] | 1.0 | 0.6 | 1919 |
| 48)<br>SW¼ of Sec. 25, T.8S., R.22E., S.B.B. & M. (Faubion)[7] | 1.0 | 0.6 | 1925 |
| 49)<br>W½ NW¼ of Sec. 12, T.9N., R.22E., S.B.B. & M. (Dudley)[7] | 1.0 | 0.6 | 1922 |
| 50)<br>N½ SE¼ and Lots 1 and 2 of Sec. 13, T.8S., R.22E., S.B.B. & M. (Douglas)[7] | 1.0 | 0.6 | 1916 |
| 51)<br>N½ SW¼, NW¼ SE¼, Lots 6 and 7, Sec. 5, T.9S., R.22E., S.B.B. & M. (Beauchamp)[7] | 1.0 | 0.6 | 1924 |
| 52)<br>NE¼ SE¼, SE¼ NE¼, and Lot 1, Sec. 26, T.8S., R.22E., S.B.B. & M. (Clark)[7] | 1.0 | 0.6 | 1916 |
| 53)<br>N½ SW¼, NW¼ SE¼, SW¼ NE¼, Sec. 13, T.9S., R.21E., S.B.B. & M. (Lawrence)[7] | 1.0 | 0.6 | 1915 |
| 54)<br>N½ NE¼, E½ NW¼, Sec. 13, T.9S., R.21E., S.B.B. & M. (J. Graham)[7] | 1.0 | 0.6 | 1914 |
| 55)<br>SE¼, Sec. 1, T.9S., R.21E., S.B.B. & M. (Geiger)[7] | 1.0 | 0.6 | 1910 |
| 56)<br>Fractional W½ of SW¼ (Lot 6) Sec. 6, T.9S., R.22E., S.B.B. & M. (Schneider)[7] | 1.0 | 0.6 | 1917 |

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*[Footnote 7 is on p. 177]*

Appendix to decree

| Defined Area of Land | Annual Diversions (acre-feet) | Annual Consumptive Use (acre-feet) | Priority Date |
|---|---|---|---|
| 57)<br>Lot 1, Sec. 15; Lots 1 & 2, Sec. 14; Lots 1 & 2, Sec. 23; all in T.13S., R.22E., S.B.B. & M. (Martinez)[7] | 1.0 | 0.6 | 1895 |
| 58)<br>NE¼, Sec. 22, T.9S., R.21E., S.B.B. & M. (Earle)[7] | 1.0 | 0.6 | 1925 |
| 59)<br>NE¼ SE¼, Sec. 22, T.9S., R.21E., S.B.B. & M. (Diehl)[7] | 1.0 | 0.6 | 1928 |
| 60)<br>N½ NW¼, N½ NE¼, Sec. 23, T.9S., R.21E., S.B.B. & M. (Reid)[7] | 1.0 | 0.6 | 1912 |
| 61)<br>W½ SW¼, Sec. 23, T.9S., R.21E., S.B.B. & M. (Graham)[7] | 1.0 | 0.6 | 1916 |
| 62)<br>S½ NW¼, NE¼ SW¼, SW¼ NE¼, Sec. 23, T.9S., R.21E., S.B.B. & M. (Cate)[7] | 1.0 | 0.6 | 1919 |
| 63)<br>SE¼ NE¼, N½ SE¼, SE¼ SE¼, Sec. 23, T.9S., R.21E., S.B.B. & M. (McGee)[7] | 1.0 | 0.6 | 1924 |
| 64)<br>SW¼ SE¼, SE¼ SW¼, Sec. 23, NE¼ NW¼, NW¼ NE¼, Sec. 26; all in T.9S., R.21E., S.B.B. & M. (Stallard)[7] | 1.0 | 0.6 | 1924 |
| 65)<br>W½ SE¼, SE¼ SE¼, Sec. 26, T.9S., R.21E., S.B.B. & M. (Randolph)[7] | 1.0 | 0.6 | 1926 |
| 66)<br>E½ NE¼, SW¼ NE¼, SE¼ NW¼, Sec. 26, T.9S., R21E., S.B.B. & M. (Stallard)[7] | 1.0 | 0.6 | 1928 |

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*[Footnote 7 is on p. 177]*

| Defined Area of Land | Annual Diversions (acre-feet) | Annual Consumptive Use (acre-feet) | Priority Date |
|---|---|---|---|
| 67) S½ SW¼ Sec. 13, N½ NW¼, Sec. 24; all in T.9S., R.21E., S.B.B. & M. (Keefe)[7] | 1.0 | 0.6 | 1926 |
| 68) SE¼ NW¼, NW¼, SE¼, Lots 2, 3, & 4, Sec. 25, T.13S., R.23E., S.B.B. & M. (C. Ferguson)[7] | 1.0 | 0.6 | 1903 |
| 69) Lots 4 & 7, Sec. 6; Lots 1 & 2, Sec. 7; all in T.14S., R.24E., S.B.B. & M. (W. Ferguson)[7] | 1.0 | 0.6 | 1903 |
| 70) SW¼ SE¼, Lots 2, 3, and 4, Sec. 24, T.12S., R.21E., Lot 2, Sec. 19, T.12S., R.22E., S.B.B. & M. (Vaulin)[7] | 1.0 | 0.6 | 1920 |
| 71) Lots 1, 2, 3, and 4, Sec. 25, T.12S., R21E., S.B.B. & M. (Salisbury) | 1.0 | 0.6 | 1920 |
| 72) Lots 2, 3, SE¼ SE¼, Sec. 15, NE¼ NE¼, Sec. 22; all in T.13S., R.22E., S.B.B. & M. (Hadlock)[7] | 1.0 | 0.6 | 1924 |
| 73) SW¼ NE¼, SE¼ NW¼, and Lots 7 & 8, Sec. 6, T.9S., R.22E., S.B.B. & M. (Streeter)[7] | 1.0 | 0.6 | 1903 |
| 74) Lot 4, Sec. 5; Lots 1 & 2, Sec. 7; Lots 1 & 2, Sec. 8; Lot 1, Sec. 18; all in T.12S., R.22E., S.B.B. & M. (J. Draper)[7] | 1.0 | 0.6 | 1903 |
| 75) SW¼ NW¼, Sec. 5; SE¼ NE¼ and Lot 9, Sec. 6; all in T.9S., R.22E., S.B.B. & M. (Fitz)[7] | 1.0 | 0.6 | 1912 |

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*[Footnote 7 is on p. 177]*

| Defined Area of Land | Annual Diversions (acre-feet) | Annual Consumptive Use (acre-feet) | Priority Date |
|---|---|---|---|
| 76)<br>NW¼ NE¼, Sec. 26; Lots 2 & 3, W½ SE¼, Sec. 23; all in T.8S., R.22E., S.B.B. & M. (Williams)[7] | 1.0 | 0.6 | 1909 |
| 77)<br>Lots 1, 2, 3, 4, & 5, Sec. 25, T.8S., R.22E., S.B.B. & M. (Estrada)[7] | 1.0 | 0.6 | 1928 |
| 78)<br>S½ NW¼, Lot 1, frac. NE¼ SW¼, Sec. 25, T.9S., R.21E., S.B.B. & M. (Whittle)[7] | 1.0 | 0.6 | 1925 |
| 79)<br>N½ NW¼, Sec. 25; S½ SW¼, Sec. 24; all in T.9S., R.21E., S.B.B. & M. (Corington)[7] | 1.0 | 0.6 | 1928 |
| 80)<br>S½ NW¼, N½ SW¼, Sec. 24, T.9S., R.21E., S.B.B. & M. (Tolliver)[7] | 1.0 | 0.6 | 1928 |

## III

## NEVADA

### Federal Establishments' Present Perfected Rights

The federal establishments named in Article II, subdivision (D), paragraphs (5) and (6) of this decree, such rights having been decreed by Article II:

| Defined Area of Land | Annual Diversions (acre-feet) | Net Acres | Priority Date |
|---|---|---|---|
| 81)<br>Fort Mojave Indian Reservation | 12,534[8] | 1,939[8] | Sept. 18, 1890 |

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*[Footnote 7 is on p. 177]*

[8] The quantity of water in each instance is measured by (i) diversions or (ii) consumptive use required for irrigation of the respective acreage and for satisfaction of related uses, whichever of (i) or (ii) is less.

Appendix to decree

| Defined Area of Land | Annual Diversions (acre-feet) | Net Acres | Priority Date |
|---|---|---|---|
| 82)<br>Lake Mead National Recreation Area (The Overton Area of Lake Mead N.R.A. provided in Executive Order 5105) | 500 | 300[9] | May 3, 1929 |

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[9] Refers to acre-feet of annual consumptive use, not to net acres.

# GONZALES, ATTORNEY GENERAL *v.* THOMAS ET AL.

## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05–552. Decided April 17, 2006

The Immigration and Nationality Act authorizes the Attorney General to grant asylum to an alien who cannot return to another country because of "persecution or a well-founded fear of persecution on account of . . . membership in a particular social group." 8 U. S. C. § 1101(a)(42)(A). In applying for asylum, respondents claimed fear of persecution in their native South Africa because of their "membership in a particular social group," as relatives of "Boss Ronnie," a white South African who allegedly held racist views and mistreated black workers. The Immigration Judge, focusing upon questions of race and political views, rejected their claim, and the Board of Immigration Appeals (BIA) affirmed. A Ninth Circuit panel held that the BIA had not adequately considered respondents' claim, and the en banc court held that a family may constitute a social group under the Act and that "persons related to Boss Ronnie" fell within the scope of the statutory term "particular social group."

*Held:* The Ninth Circuit's failure to remand the "social group" question to the administrative agency is legally erroneous, and that error is obvious in light of *INS* v. *Orlando Ventura,* 537 U. S. 12 *(per curiam).* In *Ventura,* the Ninth Circuit reversed a BIA decision without first giving the agency an opportunity to consider whether conditions in Guatemala had improved to the point that political persecution was no longer likely. Summarily reversing, this Court noted that a "court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry,'" and that "'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Id.,* at 16. No special circumstance here justified the Ninth Circuit's determination in the first instance that Boss Ronnie's family presents the kind of "kinship ties" that constitute a "particular social group." Thus, the court should have applied the "ordinary 'remand' rule," *id.,* at 18.

Certiorari granted; 409 F. 3d 1177, vacated and remanded.

PER CURIAM.

The Immigration and Nationality Act authorizes the Attorney General to grant an alien asylum if the alien cannot return to another country because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, *membership in a particular social group*, or political opinion." § 101(a)(42)(A), as added, § 201, 94 Stat. 102, 8 U. S. C. § 1101(a)(42)(A) (emphasis added). The respondents, Michelle Thomas and her immediate family, applied for asylum. They checked boxes on the application form that indicated their claim rested upon fear of persecution in their native South Africa because of (1) their "political opinion[s]," and (2) their "membership in a particular social group." In proceedings before the Immigration Judge, they emphasized their fear of persecution because of their race (they are white) and their kinship with Michelle's father-in-law, "Boss Ronnie," a white South African who allegedly held racist views and mistreated black workers at the company at which he was a foreman. The Immigration Judge, focusing upon questions of race and political views, rejected their claim. And the Board of Immigration Appeals (BIA), responding to the Thomases' primarily race-related arguments, summarily affirmed that decision.

On review, a Ninth Circuit panel held by a 2-to-1 vote that the BIA had not adequately considered the Thomases' claim of persecution because of "membership in a particular social group, as relatives of Boss Ronnie." *Thomas* v. *Ashcroft*, 359 F. 3d 1169, 1177 (2004). The Ninth Circuit took the matter en banc. The en banc court, overruling what it considered aberrant contrary Circuit precedent, unanimously held that in principle "a family *may* constitute a social group for the purposes of the refugee statutes." 409 F. 3d 1177, 1187 (2005) (emphasis added) (overruling, *inter alia*, *Estrada-Posadas* v. *INS*, 924 F. 2d 916 (CA9 1991)). In so doing, the court relied on earlier BIA opinions holding that certain "kinship ties" fall within the statutory term. See 409 F. 3d, at 1180, 1184–1186.

The court then went on to hold, over the dissent of four judges, that the particular family at issue, namely "'persons related to Boss Ronnie,'" fell within the scope of the statutory term "particular social group" and that the "Thomases were attacked and threatened because they belong to the particular social group of 'persons related to Boss Ronnie' . . . ." *Id.*, at 1189. The dissenting judges argued that the question "whether the Thomases *are* a 'particular social group'" should first be considered by the relevant administrative agency. *Id.*, at 1193 (opinion of Rymer, J.) (emphasis in original). And they said that the majority's contrary decision was inconsistent with this Court's holding in *INS* v. *Orlando Ventura*, 537 U. S. 12, 18 (2002) *(per curiam).*

The Solicitor General now asks us to grant certiorari to consider whether the Ninth Circuit "erred in holding, in the first instance and without prior resolution of the questions by the" relevant administrative agency, "that members of a family can and do constitute a 'particular social group,' within the meaning of" the Act. Pet. for Cert. I. He argues that a court's role in an immigration case is typically one of "'review, not of first view.'" *Id.*, at 29 (quoting *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005)). He adds that the decision clearly violates what this Court described in *Ventura* as the "'ordinary "remand" rule.'" Pet. for Cert. 15 (quoting *Ventura, supra,* at 18). And he concludes that "the Ninth Circuit's error is so obvious in light of *Ventura* that summary reversal would be appropriate." Pet. for Cert. 29.

We agree with the Solicitor General. The Ninth Circuit's failure to remand is legally erroneous, and that error is "obvious in light of *Ventura*," itself a summary reversal.

The alien in *Ventura* sought asylum on grounds of a reasonable fear of "persecution" in Guatemala "'on account of . . . [a] political opinion.'" 537 U. S., at 13. The BIA held that the alien did not qualify for asylum because whatever persecution he faced when he left Guatemala in 1993 was not on account of a "'political opinion.'" *Ibid.* The Ninth Circuit reversed, holding that the record showed that in 1993 the alien did indeed face politically based persecution in Guatemala. The Circuit then went on to consider the Government's alternative argument—that, in any event, conditions within Guatemala had improved to the point that political persecution was no longer likely. *Ibid.* And the Circuit rejected this "'changed circumstances'" claim without first giving the agency an opportunity to consider the matter. *Id.*, at 14.

We reversed the Ninth Circuit summarily. We pointed out that "[w]ithin broad limits the law entrusts the agency to make the basic asylum eligibility decision." *Id.*, at 16. "In such circumstances," we added, a "'judicial judgment cannot be made to do service for an administrative judgment.'" *Ibid.* (quoting *SEC* v. *Chenery Corp.*, 318 U. S. 80, 88 (1943)). "A court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'" *Ventura, supra,* at 16 (quoting *Florida Power & Light Co.* v. *Lorion,* 470 U. S. 729, 744 (1985)). "Rather, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Ventura, supra,* at 16 (quoting *Florida Power & Light Co., supra,* at 744; citing *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947)). Applying these "basic legal principles," we concluded that "every consideration that classically supports the law's ordinary remand requirement does so here." *Ventura,* 537 U. S., at 16, 17.

We must reach the same conclusion in the present case. The agency has not yet considered whether Boss Ronnie's family presents the kind of "kinship ties" that constitute a "particular social group." The matter requires determining the facts and deciding whether the facts as found fall within a statutory term. And as we said in *Ventura:*

> "The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through in-

> formed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides." *Id.*, at 17.

We can find no special circumstance here that might have justified the Ninth Circuit's determination of the matter in the first instance. Thus, as in *Ventura*, the Court of Appeals should have applied the "ordinary 'remand' rule." *Id.*, at 18.

We grant the petition for certiorari. We vacate the judgment of the Court of Appeals. And we remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

# SALINAS *v.* UNITED STATES

### ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05–8400. Decided April 24, 2006

The Fifth Circuit erred in treating petitioner's prior conviction for simple possession of a controlled substance as a "controlled substance offense" for purposes of United States Sentencing Commission, Guidelines Manual § 4B1.1(a).

Certiorari granted; 142 Fed. Appx. 830, vacated and remanded.

PER CURIAM.

The petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit and the motion of petitioner for leave to proceed *in forma pauperis* are granted. The judgment is vacated, and the case is remanded to the Fifth Circuit for further consideration.

The Fifth Circuit concluded that petitioner's prior conviction for simple possession of a controlled substance constituted a "controlled substance offense" for purposes of United States Sentencing Commission, Guidelines Manual § 4B1.1(a) (Nov. 2003). 142 Fed. Appx. 830 (2005). The term "controlled substance offense" is defined in pertinent part, however, as "an offense under federal or state law . . . that prohibits . . . the possession of a controlled substance (or a counterfeit substance) *with intent to manufacture, import, export, distribute, or dispense.*" § 4B1.2(b) (emphasis added). Accordingly, the Fifth Circuit erred in treating petitioner's conviction for simple possession as a "controlled substance offense." The Solicitor General acknowledges that the Fifth Circuit incorrectly ruled for the United States on this ground. Brief in Opposition 8–9.

# NORTHERN INSURANCE COMPANY OF NEW YORK *v.* CHATHAM COUNTY, GEORGIA

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04–1618. Argued March 1, 2006—Decided April 25, 2006

Petitioner insurance company filed this admiralty suit against respondent County seeking damages resulting from a collision between a malfunctioning County drawbridge and a boat insured by petitioner. Granting the County summary judgment, the District Court recognized that Eleventh Amendment immunity from suit does not extend to counties, but relied on Circuit precedent to conclude that sovereign immunity extends to counties and municipalities that, as here, exercise power delegated from the State. The Eleventh Circuit, which was bound by that same precedent, affirmed. It acknowledged that the County did not assert an Eleventh Amendment immunity defense, which would fail because, under other Circuit precedent, the County did not qualify as an "arm of the State." The Court of Appeals nonetheless concluded that common law has carved out a "residual immunity" that protects political subdivisions such as the County from suit.

*Held:* An entity that does not qualify as an "arm of the State" for Eleventh Amendment purposes cannot assert sovereign immunity as a defense to an admiralty suit. Pp. 193–197.

(a) Immunity from suit "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden* v. *Maine*, 527 U. S. 706, 713. Thus, the phrase "'Eleventh Amendment immunity' . . . is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Ibid.* Because preratification sovereignty is the source of immunity from suit, only States and arms of the State possess immunity from suits authorized by federal law. See, *e. g., id.*, at 740. Accordingly, sovereign immunity does not extend to counties, see, *e. g., Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 401, and n. 19, even when they "exercise a 'slice of state power,'" *id.*, at 401. The County argues unconvincingly that this Court has recognized a distinct "residual" immunity that permits adoption of a broader test than it applies in the Eleventh Amendment context to determine whether an entity is acting as an arm of the State entitled to immunity. The Court has referenced only the States' " 'residuary and inviolable sovereignty' " that survived the Constitution. See, *e. g., Federal Maritime Comm'n* v. *South Carolina Ports Authority,* 535 U. S. 743, 751. Because the County may claim immunity neither based upon its identity as a county nor under an expansive arm-of-the-State test, it is subject to suit unless it was acting as an arm of the State, as delineated by this Court's precedents, in operating the drawbridge. *E. g., Alden, supra,* at 756. The County conceded below that it was not entitled to Eleventh Amendment immunity, and both the County and the Eleventh Circuit appear to have understood this concession to be based on the County's failure to qualify as an "arm of the State" under this Court's precedent. Moreover, certiorari was granted in this case premised on the conclusion that the County is not an arm of the State for Eleventh Amendment purposes, and this Court presumes that to be the case. The County's concession and this Court's presumption are dispositive. Pp. 193–195.

(b) The County's alternative argument that the Court should recognize a distinct sovereign immunity against *in personam* admiralty suits that bars cases arising from a county's exercise of core state functions with regard to navigable waters is rejected. Such recognition cannot be reconciled with the Court's precedents, which applied the general principle that sovereign immunity does not bar a suit against a city to an admiralty suit as early as *Workman* v. *New York City,* 179 U. S. 552, 570. The Court disagrees with the County's contention that *Workman* does not govern the instant case under *Ex parte New York,* 256 U. S. 490, 498, where, in extending sovereign immunity beyond cases "in law or equity" to admiralty cases, the Court concluded that *Workman* involved only substantive admiralty law, not the power of the Court to exercise jurisdiction over a particular defendant. But *Workman* did so precisely because the Court there held that admiralty courts have jurisdiction over municipal corporations. See 179 U. S., at 565. The *Workman* Court accordingly distinguished between the question before it—whether admiralty courts may, notwithstanding state law, "redress a wrong committed by one over whom such courts have adequate jurisdiction," *id.,* at 566, such as a municipal corporation—and the question *not* before it, but before the Court in *Ex parte New York*—whether admiralty courts may "give redress in a case where jurisdiction over the person or property cannot be exerted," 179 U. S., at 566. In the former circumstance, the court should apply general admiralty principles, while in the latter the court lacks the power to do so. See *id.,* at 570; *Ex parte New York, supra,* at 499–500, 502–503. Because here, as in *Workman* and in contrast to *Ex parte New York,* the defendant was an entity generally within the District Court's jurisdiction, *Ex parte*

*New York* is inapposite, and *Workman* compels the conclusion that the County is unprotected by sovereign immunity. Pp. 195–197.

129 Fed. Appx. 602, reversed.

THOMAS, J., delivered the opinion for a unanimous Court.

*Miguel A. Estrada* argued the cause for petitioner. With him on the briefs were *Theodore J. Boutrous, Jr.*, and *Matthew D. McGill.*

*Dan Himmelfarb* argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Clement, Assistant Attorney General Keisler, Deputy Solicitor General Garre, James A. Feldman, Mark B. Stern, J. Michael Wiggins, John E. Crowley, Robert Bruce, Amy Wright Larson,* and *Phillip Christopher Hughey.*

*R. Jonathan Hart* argued the cause for respondent. With him on the brief were *Emily Elizabeth Garrard* and *David J. Bederman.**

JUSTICE THOMAS delivered the opinion of the Court.

Petitioner Northern Insurance Company of New York (Northern) filed suit against respondent Chatham County, Georgia (County), in the United States District Court for the Southern District of Georgia, seeking damages resulting from an alleged tort committed by employees of the County. The District Court granted the County's motion for summary judgment on the ground that the suit was barred by sovereign immunity. Relying on Circuit precedent, the Court of Appeals for the Eleventh Circuit affirmed. We granted certiorari to consider "[w]hether an entity that does not qualify as an 'arm of the State' for Eleventh Amendment purposes can nonetheless assert sovereign immunity as a defense to an admiralty suit." 546 U. S. 959 (2005).

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**Thomas S. Biemer* filed a brief for the Southeastern Pennsylvania Transportation Authority as *amicus curiae* urging affirmance.

## I

The County owns, operates, and maintains the Causton Bluff Bridge, a drawbridge over the Wilmington River. On October 6, 2002, James Ludwig requested that the bridge be raised to allow his boat to pass. The bridge malfunctioned, a portion falling and colliding with Mr. Ludwig's boat. As a result of the collision, Mr. Ludwig and his wife incurred damages in excess of $130,000.

The Ludwigs submitted a claim for those damages to their insurer, Northern, which paid in accordance with the terms of their insurance policy. Northern then sought to recover its costs by filing suit in admiralty against the County in the District Court. The County sought summary judgment, arguing that Northern's claims were barred by sovereign immunity. The County conceded that Eleventh Amendment immunity did not extend to counties, but nonetheless contended that it was immune under "the universal rule of state immunity from suit without the state's consent." Defendant's Brief in Support of Motion for Summary Judgment, Case No. CV403–099, App. 33a. The District Court agreed, relying on *Broward County* v. *Wickman,* 195 F. 2d 614 (CA5 1952), to conclude that sovereign immunity extends to counties and municipalities that, as here, "exercis[e] power delegated from the State." *Zurich Ins. Co.* v. *Chatham County,* No. CV403–99, App. 77a.

The Eleventh Circuit, which was bound to follow *Wickman* as Circuit precedent, affirmed.[1] The Court of Appeals acknowledged that the County did not assert an Eleventh Amendment immunity defense, which would fail because, under Circuit precedent, the County did not qualify as an arm of the State. *Zurich Ins. Co.* v. *Chatham County,* No. 04–13308 (Jan. 28, 2005), App. 83a, n. 1, judgt. order reported at 129 Fed. Appx. 602. The Court of Appeals nonetheless concluded that "common law has carved out a 'residual immunity,' which would protect a political subdivision such as Chatham County from suit." App. 83a. We granted certiorari to review the judgment of the Court of Appeals.

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[1] See *Bonner* v. *Prichard,* 661 F. 2d 1206, 1209 (CA11 1981) (en banc) (adopting all decisions of the former Fifth Circuit announced prior to October 1, 1981, as binding precedent in the Eleventh Circuit).

## II

This Court's cases have recognized that the immunity of States from suit "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden* v. *Maine,* 527 U. S. 706, 713 (1999); see *Seminole Tribe of Fla.* v. *Florida,* 517 U. S. 44, 55–56 (1996); *Principality of Monaco* v. *Mississippi,* 292 U. S. 313, 322–323 (1934). Consistent with this recognition, which no party asks us to reexamine today, we have observed that the phrase "'Eleventh Amendment immunity' . . . is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden,* 527 U. S., at 713.

A consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that only States and arms of the State possess immunity from suits authorized by federal law. See *id.,* at 740; *Mt. Healthy City Bd. of Ed.* v. *Doyle,* 429 U. S. 274, 280 (1977). Accordingly, this Court has repeatedly refused to extend sovereign immunity to counties. See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U. S. 391, 401 (1979); *id.,* at 401, n. 19 (gathering cases); *Workman* v. *New York City,* 179 U. S. 552, 565 (1900); *Lincoln County* v. *Luning,* 133 U. S. 529, 530 (1890). See also *Jinks* v. *Richland County,* 538 U. S. 456, 466 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit"). This is true even when, as respondent alleges here, "such entities exercise a 'slice of state power.'" *Lake Country Estates, supra,* at 401.

The County argues that this Court's cases recognize a distinct "residual" immunity that permits adoption of a broader test than we apply in the Eleventh Amendment context to determine whether an entity is acting as an arm of the State and is accordingly entitled to immunity.[2] Brief for Respondent 28. But this Court's use of that term does not suggest the County's conclusion; instead, this Court has referenced only the States' "residuary and inviolable sovereignty" that survived the Constitution. See The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison); *Federal Maritime Comm'n* v. *South Carolina Ports Authority,* 535 U. S. 743, 751 (2002).

Because the County may claim immunity neither based upon its identity as a county nor under an expansive arm-of-the-State test, the County is subject to suit unless it was acting as an arm of the State, as delineated by this Court's precedents, in operating the drawbridge. *Alden, supra,* at 756; *Lake Country Estates, supra,* at 400–401. The County conceded below that it was not entitled to Eleventh Amendment immunity, and both the County and the Court of Appeals appear to have understood this concession to be based on the County's failure to qualify as an arm of the State under our precedent. See App. 83a, n. 1 (recognizing that the County rightly disclaimed an Eleventh Amendment immunity defense because such a defense would be inconsistent with the court's holding in *Vierling* v. *Celebrity Cruises, Inc.*, 339 F. 3d 1309 (CA11 2003), that the Broward County Port Authority was not an arm of the State); Brief of Appellee Chatham County in No. 04–13308DD (CA11), p. 13 (distinguishing *Vierling* in part because it dealt with the question of Eleventh Amendment immunity); see also Brief for Respondent 8 (implicitly conceding that respondent is not an arm of the State under our Eleventh Amendment jurisprudence). Moreover, the question on which we granted certiorari is premised on the conclusion that the County is not "an 'arm of the State' for Eleventh Amendment purposes," 546 U. S. 959 (2005), and we presume that to be the case. Accordingly, the County's concession and the presumption underlying the question on which we granted review are dispositive.

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[2] It is unclear whether respondent believes that residual immunity is a common-law immunity that has been unaltered by federal substantive law, see Brief for Respondent 18 ("Chatham County's sovereign immunity derives from the common law which pre-dates Eleventh Amendment immunity"), or, as the Solicitor General appears to believe, a constitutionally based immunity that is distinguishable from the one drawn from the constitutional structure, see Tr. of Oral Arg. 16 ("What respondent calls residual sovereign immunity . . . is the doctrine of constitutional sovereign immunity"). In either case, it appears that the residual immunity would serve to extend sovereign immunity beyond its preratification scope.

As an alternative ground for affirmance, the County asks the Court to recognize a distinct sovereign immunity against *in personam* admiralty suits that bars cases arising from a county's exercise of core state functions with regard to navigable waters. Recognition of a distinct immunity in admiralty cases cannot be reconciled with our precedents. Immunity in admiralty, like other sovereign immunity, is simply an application of "the fundamental rule" that "the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given." *Ex parte New York*, 256 U. S. 490, 497–500 (1921). Accordingly, this Court has resolved sovereign immunity questions in admiralty by relying upon principles set out in this Court's sovereign immunity cases, rather than by examining the history or jurisprudence specific to suits in admiralty. See *Federal Maritime Comm'n* v. *South Carolina Ports Authority, supra,* at 754–769 (an admiralty suit relying heavily on *Alden, supra* (plaintiff raised a Fair Labor Standards Act of 1938 claim), and *Seminole Tribe of Fla.* v. *Florida, supra* (plaintiff alleged violation of the Indian Gaming Regulatory Act)). Indeed, the Court applied the general principle that sovereign immunity does not bar a suit against a city to an admiralty suit as early as *Workman* v. *New York City,* 179 U. S. 552, which held that such immunity "afforded no reason for denying redress in a court of admiralty for the wrong which . . . [had] been committed" by the city of New York, *id.,* at 570.

The County nonetheless contends—and the Eleventh Circuit, in reliance upon the Fifth Circuit's analysis in *Wickman,* held—that the reach of *Workman* is limited, and that this Court's decision in *Ex parte New York, supra,* demonstrates that *Workman* does not govern the instant case. See *Wickman,* 195 F. 2d, at 615. We disagree. *Ex parte New York* extended sovereign immunity beyond cases "in law or equity" to cases in admiralty. As the County points out, *Ex parte New York* concluded that *Workman* involved only the substantive law of admiralty, and not the power of the Court to exercise jurisdiction over a particular defendant. *Ex parte New York, supra,* at 498. But *Workman* dealt only with the substantive law of admiralty precisely because the *Workman* Court held that admiralty courts have jurisdiction over municipal corporations. See 179 U. S., at 565 ("[A]s a general rule, municipal corporations, like individuals, may be sued; in other words . . . they are amenable to judicial process for the purpose of compelling performance of their obligations"). The *Workman* Court accordingly distinguished between the question before it—whether courts of admiralty may, notwithstanding state law, "redress a wrong committed by one over whom such courts have adequate jurisdiction," *id.,* at 566, such as a municipal corporation—and the question *not* before it, but before the Court in *Ex parte New York*—whether courts of admiralty may "give redress in a case where jurisdiction over the person or property cannot be exerted," 179 U. S., at 566. In the former circumstance, the court should apply general admiralty principles, while in the latter the court lacks the power to do so. See *id.,* at 570; *Ex parte New York, supra,* at 499–500, 502–503. Because here, as in *Workman* and in contrast to *Ex parte New York,* the defendant was an entity generally within the jurisdiction of the District Court, *Ex parte New York* is inapposite, and *Workman* compels the conclusion that the County is unprotected by sovereign immunity.

* * *

Because the County has failed to demonstrate that it was acting as an arm of the State when it operated the Causton Bluff Bridge, the County is not entitled to immunity from Northern's suit. Accordingly, the judgment of the Court of Appeals is reversed.

*It is so ordered.*

# DAY *v.* McDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04–1324. Argued February 27, 2006—Decided April 25, 2006

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) sets a one-year limitation period for filing a state prisoner's federal habeas corpus petition, running from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," 28 U. S. C. § 2244(d)(1)(A), but stops the one-year clock while the petitioner's "properly filed" application for state postconviction relief "is pending," § 2244(d)(2). Under Eleventh Circuit precedent, which is not challenged here, that tolling period does not include the 90 days in which a petitioner might have sought certiorari review in this Court challenging state-court denial of postconviction relief.

Petitioner Day's Florida trial-court sentence was affirmed on December 21, 1999, and his time to seek this Court's review of the final state-court decision expired on March 20, 2000. Day unsuccessfully sought state postconviction relief 353 days later. The trial court's judgment was affirmed on appeal, effective December 3, 2002. Day petitioned for federal habeas relief 36 days later, on January 8, 2003. Florida's answer asserted that the petition was "timely" because it was filed after 352 days of untolled time. Inspecting the answer and attachments, however, a Federal Magistrate Judge determined that the State had miscalculated the tolling time: Under the controlling Eleventh Circuit precedent, the untolled time was actually 388 days, rendering the petition untimely. After affording Day an opportunity to show cause why the petition should not be dismissed for failure to meet AEDPA's one-year deadline, the Magistrate Judge found petitioner's responses inadequate and recommended dismissal. The District Court adopted the recommendation, and the Eleventh Circuit affirmed, concluding that a State's patently erroneous concession of timeliness does not compromise a district court's authority *sua sponte* to dismiss a habeas petition as untimely.

*Held:* In the circumstances here presented, the District Court had discretion to correct the State's erroneous computation and, accordingly, to dismiss the habeas petition as untimely under AEDPA's one-year limitation. Pp. 202–211.

(a) A statute of limitations defense is not jurisdictional, therefore courts are under no obligation to raise the matter *sua sponte.* Cf. *Kontrick* v. *Ryan,* 540 U. S. 443, 458. As a general matter, a defendant forfeits a statute of limitations defense not asserted in its answer or in an amendment thereto. See Fed. Rules Civ. Proc. 8(c), 12(b), and 15(a) (made applicable to federal habeas proceedings by Rule 11 of the Rules governing such proceedings). And the Court would count it an abuse of discretion to override a State's deliberate waiver of the limitations defense. But, in appropriate circumstances, a district court may raise a time bar on its own initiative. The District Court in this case confronted no intelligent waiver on the State's part, only an evident miscalculation of time. In this situation the Court declines to adopt either an inflexible rule requiring dismissal whenever AEDPA's one-year clock has run, or, at the opposite extreme, a rule treating the State's failure initially to plead the one-year bar as an absolute waiver. Rather, the Court holds that a district court has discretion to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition. This resolution aligns the statute of limitations with other affirmative defenses to habeas petitions, notably exhaustion of state remedies, procedural default, and nonretroactivity. In *Granberry* v. *Greer,* 481 U. S. 129, 133, this Court held that federal appellate courts have discretion to consider a state prisoner's failure to exhaust available state remedies before invoking federal habeas jurisdiction despite the State's failure to interpose the exhaustion defense at the district-court level. Similarly, in *Caspari* v. *Bohlen,* 510 U. S. 383, 389, the Court held that "a federal court may, but need not, decline to apply [the nonretroactivity rule announced in *Teague* v. *Lane,* 489 U. S. 288, 310,] if the State does not argue it." It would make scant sense to distinguish AEDPA's time bar from these other threshold constraints on federal habeas petitioners. While a district court is not required to doublecheck the State's math, cf. *Pliler* v. *Ford,* 542 U. S. 225, 231, no Rule, statute, or constitutional provision commands a judge who detects a clear computation error to suppress that knowledge. Cf. Fed. Rule Civ. Proc. 60(a). The Court notes particularly that the Magistrate Judge, instead of acting *sua sponte,* might have informed the State of its obvious computation error and entertained an amendment to the State's answer. See, *e. g.,* Rule 15(a). There is no dispositive difference between that route, and the one taken here. Pp. 202–210.

(b) Before acting *sua sponte,* a court must accord the parties fair notice and an opportunity to present their positions. It must also assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and "determine whether the interests of justice would be better served" by addressing the merits or by dismissing the petition as time barred. See *Granberry*, 481 U. S., at 136. Here, the Magistrate Judge gave Day due notice and a fair opportunity to show why the limitation period should not yield dismissal. The notice issued some nine months after the State's answer. No court proceedings or action occurred in the interim, and nothing suggests that the State "strategically" withheld the defense or chose to relinquish it. From all that appears in the record, there was merely an inadvertent error, a miscalculation that was plain under Circuit precedent, and no abuse of discretion in following *Granberry* and *Caspari*. Pp. 210–211.

391 F. 3d 1192, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, SOUTER, and ALITO, JJ., joined. STEVENS, J., filed an opinion dissenting from the judgment, in which BREYER, J., joined, *post*, p. 211. SCALIA, J., filed a dissenting opinion, in which THOMAS and BREYER, JJ., joined, *post*, p. 212.

*J. Brett Busby* argued the cause for petitioner. With him on the briefs were *Jeremy Gaston* and *Andrew H. Schapiro*.

*Christopher M. Kise*, Solicitor General of Florida, argued the cause for respondent. With him on the brief were *Charles J. Crist, Jr.*, Attorney General, *Erik M. Figlio* and *Lynn C. Hearn*, Deputy Solicitors General, and *Cassandra K. Dolgin*, Assistant Attorney General.

*Douglas Hallward-Driemeier* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Fisher*, *Deputy Solicitor General Dreeben*, and *Kathleen A. Felton*.*

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*Briefs of *amici curiae* urging reversal were filed for the National Association of Criminal Defense Lawyers by *Stephen B. Kinnaird* and *Pamela Harris;* for Janet Cooper Alexander et al. by *Jeffrey A. Lamken;* and for John Blume et al. by *Elaine Metlin* and *Ann-Marie Luciano*.

A brief of *amici curiae* urging affirmance was filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *Barry R. McBee*, First Assistant Attorney General, *R. Ted Cruz*, Solicitor General, *Don Clemmer*, Deputy Attorney General, *Gena Bunn* and *Ellen Stewart-Klein*, Assistant Attorneys General, and *Dan Schweitzer*, and by the At-

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the authority of a U. S. District Court, on its own initiative, to dismiss as untimely a state prisoner's petition for a writ of habeas corpus. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, sets a one-year limitation period for filing such petitions, running from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U. S. C. § 2244(d)(1)(A). The one-year clock is stopped, however, during the time the petitioner's "properly filed" application for state postconviction relief "is pending." § 2244(d)(2). Under Eleventh Circuit precedent, that tolling period does not include the 90 days in which a petitioner might have sought certiorari review in this Court challenging state-court denial of postconviction relief. *Coates* v. *Byrd*, 211 F. 3d 1225, 1227 (2000).

In the case before us, the State's answer to the federal habeas petition "agree[d] the petition [was] timely" because it was "filed after 352 days of untolled time." App. 24. Inspecting the pleadings and attachments, a Federal Magistrate Judge determined that the State had miscalculated the tolling time. Under Circuit precedent, the untolled time

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torneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *Bill Lockyer* of California, *John W. Suthers* of Colorado, *Carl C. Danberg* of Delaware, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Phill Kline* of Kansas, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Jim Hood* of Mississippi, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *George J. Chanos* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry McMaster* of South Carolina, *Larry Long* of South Dakota, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Rob McKenna* of Washington, and *Darrell V. McGraw, Jr.*, of West Virginia.

was 388 days, rendering the petition untimely by some three weeks. After affording the petitioner an opportunity to show cause why the petition should not be dismissed for failure to meet the statutory deadline, and finding petitioner's responses inadequate, the Magistrate Judge recommended dismissal of the petition. The District Court adopted the Magistrate Judge's recommendation, and the Court of Appeals affirmed, concluding that "[a] concession of timeliness by the state that is patently erroneous does not compromise the authority of a district court *sua sponte* to dismiss a habeas petition as untimely, under AEDPA." *Day* v. *Crosby*, 391 F. 3d 1192, 1195 (CA11 2004) *(per curiam)*.

The question presented is whether a federal court lacks authority, on its own initiative, to dismiss a habeas petition as untimely, once the State has answered the petition without contesting its timeliness. Ordinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto. Fed. Rules Civ. Proc. 8(c), 12(b), and 15(a). And we would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense. In this case, however, the federal court confronted no intelligent waiver on the State's part, only an evident miscalculation of the elapsed time under a statute designed to impose a tight time constraint on federal habeas petitioners.[1] In the circumstances here presented, we hold, the federal court had discretion to correct the State's error and, accordingly, to dismiss the petition as untimely under AEDPA's one-year limitation.

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[1] Until AEDPA took effect in 1996, no statute of limitations applied to habeas petitions. See *Mayle* v. *Felix*, 545 U. S. 644, 654 (2005). Courts invoked the doctrine of "prejudicial delay" to screen out unreasonably late filings. See generally 2 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 24 (4th ed. 2001). In AEDPA, Congress prescribed a uniform rule: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U. S. C. § 2244(d)(1).

## I

Petitioner Patrick A. Day was convicted of second-degree murder and sentenced to 55 years in prison by a Florida trial court. Day unsuccessfully appealed the sentence, which was affirmed on December 21, 1999. Day did not seek this Court's review of the final state-court decision; his time to do so expired on March 20, 2000.

Three hundred and fifty-three (353) days later, Day unsuccessfully sought state postconviction relief. The Florida trial court's judgment denying relief was affirmed on appeal, and the appellate court issued its mandate on December 3, 2002. See *Nyland* v. *Moore*, 216 F. 3d 1264, 1267 (CA11 2000) (under Florida law, appellate order "is pending" until the mandate issues). Thirty-six (36) days thereafter, on January 8, 2003, Day petitioned for federal habeas relief asserting several claims of ineffective assistance of trial counsel. A Magistrate Judge, finding the petition "in proper form," App. 21, ordered the State to file an answer, *id.*, at 21–22. In its responsive pleading, the State failed to raise AEDPA's one-year limitation as a defense. See *supra*, at 201. Overlooking controlling Eleventh Circuit precedent, see *Coates*, 211 F. 3d, at 1227, the State calculated that the petition had been "filed after 352 days of untolled time," and was therefore "timely." App. 24. The State's answer and attachments, however, revealed that, had the State followed the Eleventh Circuit's instruction on computation of elapsed time, the timeliness concession would not have been made: Under the Circuit's precedent, more than one year, specifically, 388 days of untolled time, had passed between the finality of Day's state-court conviction and the filing of his federal habeas petition.[2]

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[2] Day urges this Court to find his petition timely. He asserts that the Eleventh Circuit misinterpreted § 2244(d)(2) in holding that AEDPA's time limitation was not tolled during the 90-day period he could have petitioned this Court to review the denial of his motion for state postconviction relief. See Brief for Petitioner 45–50. This question was not "set out in the

A newly assigned Magistrate Judge noticed the State's computation error and ordered Day to show cause why his federal habeas petition should not be dismissed as untimely. *Id.*, at 26–30. Determining that Day's responses did not overcome the time bar, the Magistrate Judge recommended dismissal of the petition, App. to Pet. for Cert. 8a–15a, and the District Court adopted that recommendation, *id.*, at 7a.

The Eleventh Circuit granted Day a certificate of appealability on the question "[w]hether the district court erred in addressing the timeliness of [Day's] habeas corpus petition . . . after the [State] had conceded that [the] petition was timely." App. 37. In a decision rendered two years earlier, *Jackson* v. *Secretary for Dept. of Corrections*, 292 F. 3d 1347 (2002), the Eleventh Circuit had ruled that, "even though the statute of limitations is an affirmative defense, the district court may review *sua sponte* the timeliness of [a federal habeas] petition." *Id.*, at 1349. Adhering to *Jackson*, and satisfied that the State's concession of timeliness "was patently erroneous," the Eleventh Circuit affirmed the dismissal of Day's petition. 391 F. 3d, at 1192–1195.[3]

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petition [for certiorari], or fairly included therein," and we therefore do not consider it here. This Court's Rule 14.1(a). We note, however, that the Court recently granted certiorari in *Lawrence* v. *Florida*, No. 05–8820, *post*, p. 1039 (cert. granted, Mar. 27, 2006), which presents the question whether AEDPA's time limitation is tolled during the pendency of a petition for certiorari from a judgment denying state postconviction relief. The instant opinion, we emphasize, addresses only the authority of the District Court to raise AEDPA's time bar, not the correctness of its decision that the limitation period had run.

[3] Day reads the Eleventh Circuit's opinion in this case as rendering mandatory a district court's *sua sponte* application of AEDPA's one-year limitation, even when the respondent elects to waive the limitation and oppose the petition solely on the merits. See Tr. of Oral Arg. 6–8. He points to a sentence in the Eleventh Circuit's brief *per curiam* opinion stating: "A federal court that sits in collateral review of a criminal judgment of a state court has an obligation to enforce the federal statute of limitations." 391 F. 3d, at 1194. We read the Eleventh Circuit's summary disposition in line with that court's description of its controlling precedent: "We . . .

We granted certiorari *sub nom. Day* v. *Crosby,* 545 U. S. 1164 (2005), in view of the division among the Circuits on the question whether a district court may dismiss a federal habeas petition as untimely under AEDPA, despite the State's failure to raise the one-year limitation in its answer to the petition or its erroneous concession of the timeliness issue. Compare, *e. g., Long* v. *Wilson,* 393 F. 3d 390, 401–404 (CA3 2004), and 391 F. 3d, at 1194–1195 (case below), with *Scott* v. *Collins,* 286 F. 3d 923, 930–931 (CA6 2002), and *Nardi* v. *Stewart,* 354 F. 3d 1134, 1141–1142 (CA9 2004).

## II

A statute of limitations defense, the State acknowledges, is not "jurisdictional," hence courts are under no *obligation* to raise the time bar *sua sponte.* See, *e. g., Acosta* v. *Artuz,* 221 F. 3d 117, 122 (CA2 2000); *Hill* v. *Braxton,* 277 F. 3d 701, 705 (CA4 2002); *Davis* v. *Johnson,* 158 F. 3d 806, 810 (CA5 1998); cf. *Kontrick* v. *Ryan,* 540 U. S. 443, 458 (2004) (defendant forfeited untimeliness argument "by failing to raise the issue until after [the] complaint was adjudicated on the merits"). In this respect, the limitations defense resembles other threshold barriers—exhaustion of state remedies, procedural default, nonretroactivity—courts have typed "nonjurisdictional," although recognizing that those defenses "implicat[e] values beyond the concerns of the parties." *Acosta,* 221 F. 3d, at 123 ("The AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the

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ruled that, 'even though the statute of limitations is an affirmative defense, the district court *may* review *sua sponte* the timeliness of [a federal habeas] petition.'" *Ibid.* (referring to *Jackson* v. *Secretary for Dept. of Corrections,* 292 F. 3d, at 1349; emphasis added); see also 391 F. 3d, at 1195 (State's "patently erroneous" concession of timeliness "does not compromise *the authority* of a district court *sua sponte* to dismiss a habeas petition as untimely" under AEDPA's one-year limitation (emphasis added)).

record is fresh, and lends finality to state court judgments within a reasonable time.").

On the exhaustion of state remedies doctrine, requiring state prisoners, before invoking federal habeas jurisdiction, to pursue remedies available in state court, *Granberry* v. *Greer*, 481 U. S. 129 (1987), is the pathmarking case. We held in *Granberry* that federal appellate courts have discretion to consider the issue of exhaustion despite the State's failure to interpose the defense at the district-court level. *Id.*, at 133.[4] Later, in *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994), we similarly held that "a federal court may, but need not, decline to apply [the nonretroactivity rule announced in *Teague* v. *Lane*, 489 U. S. 288, 310 (1989) (plurality opinion),] if the State does not argue it." See also *Schiro* v. *Farley*, 510 U. S. 222, 229 (1994) (declining to address nonretroactivity defense that State raised only in Supreme Court merits brief, "[a]lthough we undoubtedly have the discretion to reach" the argument).

While the issue remains open in this Court, see *Trest* v. *Cain*, 522 U. S. 87, 90 (1997),[5] the Courts of Appeals have unanimously held that, in appropriate circumstances, courts, on their own initiative, may raise a petitioner's procedural default, *i. e.*, a petitioner's failure properly to present an alleged constitutional error in state court, and the consequent adequacy and independence of state-law grounds for the state-court judgment. See *Brewer* v. *Marshall*, 119 F. 3d 993, 999 (CA1 1997); *Rosario* v. *United States*, 164 F. 3d 729, 732 (CA2 1998); *Sweger* v. *Chesney*, 294 F. 3d 506, 520 (CA3

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[4] In AEDPA, enacted nearly a decade after *Granberry*, Congress expressly provided that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U. S. C. §2254(b)(3).

[5] *Trest* held that a Court of Appeals was not obliged to raise procedural default on its own initiative, but declined to decide whether courts have discretion to do so. 522 U. S., at 89.

2002); *Yeatts* v. *Angelone,* 166 F. 3d 255, 261 (CA4 1999); *Magouirk* v. *Phillips,* 144 F. 3d 348, 358 (CA5 1998); *Sowell* v. *Bradshaw,* 372 F. 3d 821, 830 (CA6 2004); *Kurzawa* v. *Jordan,* 146 F. 3d 435, 440 (CA7 1998); *King* v. *Kemna,* 266 F. 3d 816, 822 (CA8 2001) (en banc); *Vang* v. *Nevada,* 329 F. 3d 1069, 1073 (CA9 2003); *United States* v. *Wiseman,* 297 F. 3d 975, 979 (CA10 2002); *Moon* v. *Head,* 285 F. 3d 1301, 1315, n. 17 (CA11 2002).

Petitioner Day relies heavily on Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rules), *i. e.*, the procedural Rules governing federal habeas petitions from state prisoners, in urging that AEDPA's limitation may be raised by a federal court *sua sponte* only at the preanswer, initial screening stage. Habeas Rule 4 provides that district courts "must promptly examine" state prisoner habeas petitions and must dismiss the petition "[i]f it plainly appears . . . that the petitioner is not entitled to relief." Once an answer has been ordered and filed, Day maintains, the court loses authority to rule the petition untimely *sua sponte.*[6] At that point, according to Day, the Federal Rules of Civil Procedure hold sway. See Habeas Rule 11 ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.").[7] Under the Civil Procedure Rules, a defendant forfeits a statute of limitations defense, see Fed.

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[6] Were we to accept Day's position, courts would never (or, at least, hardly ever) be positioned to raise AEDPA's time bar *sua sponte.* As this Court recognized in *Pliler* v. *Ford,* 542 U. S. 225, 232 (2004), information essential to the time calculation is often absent—as it was in this case—until the State has filed, along with its answer, copies of documents from the state-court proceedings.

[7] The Habeas Rules were amended after the proceedings below. We cite the current version because both parties agree that the amendments to Rules 4 and 11, effective December 1, 2004, wrought no relevant substantive change.

Rule Civ. Proc. 8(c), not asserted in its answer, see Rule 12(b), or an amendment thereto, see Rule 15(a).

The State, on the other hand, points out that the statute of limitations is akin to other affirmative defenses to habeas petitions, notably, exhaustion of state remedies, procedural default, and nonretroactivity. Indeed, the statute of limitations is explicitly aligned with those other defenses under the current version of Habeas Rule 5(b), which provides that the State's answer to a habeas petition "must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations." The considerations of comity, finality, and the expeditious handling of habeas proceedings that motivated AEDPA,[8] the State maintains, counsel against an excessively rigid or formal approach to the affirmative defenses now listed in Habeas Rule 5. Citing *Granberry*, 481 U. S., at 131–134, as the instructive case, the State urges express recognition of an "intermediate approach." Brief for Respondent 14 (internal quotation marks omitted); see also *id.*, at 25. In lieu of an inflexible rule requiring dismissal whenever AEDPA's one-year clock has run, or, at the opposite extreme, a rule treating the State's failure initially to plead the one-year bar as an absolute waiver, the State reads the statutes, Rules, and decisions in point to permit the "exercise [of] discretion in each case to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition." *Id.*, at 14. Employing that "intermediate approach" in this particular case, the State argues, the petition should not be deemed timely simply because a government attorney calculated the days in between petitions incorrectly.

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[8] See *Rhines* v. *Weber*, 544 U. S. 269, 276 (2005) (AEDPA's time bar "quite plainly serves the well-recognized interest in the finality of state court judgments"; it "reduces the potential for delay on the road to finality." (quoting *Duncan* v. *Walker*, 533 U. S. 167, 179 (2001))).

We agree, noting particularly that the Magistrate Judge, instead of acting *sua sponte,* might have informed the State of its obvious computation error and entertained an amendment to the State's answer. See Fed. Rule Civ. Proc. 15(a) (leave to amend "shall be freely given when justice so requires"); see also 28 U. S. C. § 2243 (State's response to habeas petition may be amended by leave of court); cf. *Long,* 393 F. 3d, at 402–404 (District Court raised the statute of limitations *sua sponte,* the State agreed with that disposition, and the Court of Appeals treated that agreement as a constructive amendment to the State's answer). Recognizing that an amendment to the State's answer might have obviated this controversy,[9] we see no dispositive difference between that route, and the one taken here. See Brief for Respondent 24 ("Here, the State did not respond to the show cause order because its concession of timeliness was based on an erroneous calculation and it agreed the petition should be dismissed as untimely."); cf. *Slack* v. *McDaniel,* 529 U. S. 473, 487 (2000) (admonishing against interpretation of procedural prescriptions in federal habeas cases to "trap the unwary *pro se* prisoner" (quoting *Rose* v. *Lundy,* 455 U. S. 509, 520 (1982))).

In sum, we hold that district courts are permitted, but not obliged, to consider, *sua sponte,* the timeliness of a state prisoner's habeas petition. We so hold, noting that it would make scant sense to distinguish in this regard AEDPA's time bar from other threshold constraints on federal habeas petitioners. See *supra,* at 206–207; Habeas Rule 5(b) (placing "a statute of limitations" defense on a par with "failure to exhaust state remedies, a procedural bar, [and] nonretroactivity"); *Long,* 393 F. 3d, at 404 ("AEDPA's statute of limitations advances the same concerns as those advanced by the doctrines of exhaustion and procedural default, and must be treated the same."). We stress that a district court is not required to doublecheck the State's math. If, as this Court has held, "[d]istrict judges have no obligation to act as counsel or paralegal to *pro se* litigants," *Pliler* v. *Ford*, 542 U. S. 225, 231 (2004),[10] then, by the same token, they surely have no obligation to assist attorneys representing the State. Nevertheless, if a judge does detect a clear computation error, no Rule, statute, or constitutional provision commands the judge to suppress that knowledge. Cf. Fed. Rule Civ. Proc. 60(a) (clerical errors in the record "arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party").

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[9] The Court is unanimous on this point. See *post,* at 216, n. 2 (SCALIA, J., dissenting).

Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions. See, *e. g.*, *Acosta*, 221 F. 3d, at 124–125; *McMillan* v. *Jarvis*, 332 F. 3d 244, 250 (CA4 2003). Further, the court must assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and "determine whether the interests of justice would be better served" by addressing the merits or by dismissing the petition as time barred. See *Granberry*, 481 U. S., at 136.[11] Here, the Magistrate Judge gave Day due notice and a fair opportunity to show why the limitation period should not yield dismissal of the petition. The notice issued some nine months after the State answered the petition. No court proceedings or action occurred in the interim, and nothing in the record suggests that the State "strategically" withheld the defense or chose to relinquish it. From all that appears in the record, there was merely an inadvertent error, a miscalculation that was plain under Circuit precedent, and no abuse of discretion in following this Court's lead in *Granberry* and *Caspari,* described *supra,* at 206–207.

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[10] The procedural hindrance in *Pliler* was the petitioner's failure to exhaust state remedies. The Court in that case declined to rule on the propriety of the stay-and-abeyance procedure that would enable a habeas petitioner to remain in federal court while exhausting unexhausted claims in state court. 542 U. S., at 231. In a later decision, *Rhines*, 544 U. S., at 278–279, this Court held that a district court has discretion to stay a mixed petition (*i. e.*, one that includes both exhausted and unexhausted claims) to allow a habeas petitioner to present his unexhausted claims to the state court in the first instance, then return to federal court for review of his perfected petition.

[11] A district court's discretion is confined within these limits. As earlier noted, should a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice. See *supra*, at 202. But see *post*, at 217–218 (SCALIA, J., dissenting).

* * *

For the reasons stated, the judgment of the Court of Appeals is

*Affirmed.*

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting from the judgment.

Although JUSTICE BREYER and I disagree on the proper answer to the question on which we granted certiorari—in my view, JUSTICE GINSBURG's opinion for the Court correctly decides that question, while JUSTICE BREYER has joined JUSTICE SCALIA's dissenting opinion—we agree on the proper disposition of this case. In our view, the Court should announce its opinion now, but it should postpone the entry of judgment pending our decision in *Lawrence* v. *Florida,* No. 05–8820, cert. granted, *post,* p. 1039. As JUSTICE GINSBURG notes, the question whether the Court of Appeals correctly concluded that Day's habeas corpus petition was barred by the statute of limitations will be answered by our decision in *Lawrence.* See *ante,* at 203–204, n. 2. It seems improvident to affirm a possibly erroneous Court of Appeals judgment that dismissed Day's habeas petition without an evaluation of its merits when we have already granted certiorari to address the issue on which the Court of Appeals may have erred. Of course, the Court of Appeals may avoid a miscarriage of justice by keeping this case on its docket until after we decide *Lawrence,* but it would be better practice for us to do so ourselves. Accordingly, we respectfully dissent from the entry of the Court's judgment at this time.

JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE BREYER join, dissenting.

The Court today disregards the Federal Rules of Civil Procedure (Civil Rules) in habeas corpus cases, chiefly because it believes that this departure will make no difference. See *ante,* at 209. Even if that were true, which it is not, I could not join this novel presumption *against* applying the Civil Rules.

The Civil Rules "govern the procedure in the United States district courts in all suits of a civil nature." Rule 1. This includes "proceedings for . . . habeas corpus," Rule 81(a)(2), but only "to the extent that the practice in such proceedings is not set forth in statutes of the United States [or] the Rules Governing Section 2254 Cases" (Habeas Rules), Civil Rule 81(a)(2); see also Habeas Rule 11. Thus, "[t]he Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the Habeas Corpus Rules," *Woodford* v. *Garceau,* 538 U. S. 202, 208 (2003), and do not contradict or undermine the provisions of the habeas corpus statute, *Gonzalez* v. *Crosby,* 545 U. S. 524, 529–530 (2005).

As the Court notes, the Civil Rules adopt the traditional forfeiture rule for unpleaded limitations defenses. See *ante,* at 207–208 (citing Rules 8(c), 12(b), 15(a)). The Court does not identify any "inconsisten[cy]" between this forfeiture rule and the statute, Rules, or historical practice of habeas proceedings—because there is none. Forfeiture of the limitations defense is demonstrably not inconsistent with traditional habeas practice, because, as the Court acknowledges, habeas practice included no statute of limitations until 1996. *Ante,* at 202, n. 1; see also *infra,* at 214–216. Forfeiture is perfectly consistent with Habeas Rule 5(b), which now provides that the State's "answer . . . *must* state whether any claim in the petition is barred by . . . statute of limitations." (Emphasis added.) And forfeiture is also consistent with (and indeed, arguably suggested by) Habeas Rule 4, because Rule 4 provides for *sua sponte* screening and dismissal of habeas petitions only *prior* to the filing of the State's responsive pleading.[1]

Most importantly, applying the forfeiture rule to the limitations period of 28 U. S. C. § 2244(d) does not contradict or undermine any provision of the habeas statute. Quite the contrary, on its most natural reading, the statute calls for the forfeiture rule. AEDPA expressly enacted, without further qualification, "[a] 1-year *period of limitation*" for habeas applications by persons in custody pursuant to the judgments of state courts. § 2244(d)(1) (emphasis added). We have repeatedly stated that the enactment of time-limitation periods such as that in § 2244(d), without further elaboration, produces defenses that are nonjurisdictional and thus subject to waiver and forfeiture. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 393 (1982); see also *Eberhart* v. *United States*, 546 U. S. 12, 15 (2005) *(per curiam)*; *Kontrick* v. *Ryan*, 540 U. S. 443, 447 (2004). Absent some affirmative incompatibility with habeas practice, there is no reason why a habeas limitations period should be any different. By imposing an unqualified "period of limitation" against the background understanding that a defense of "limitations" must be raised in the answer, see Civil Rules 8(c), 12(b), the statute implies that the usual forfeiture rule is applicable.

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[1] The Court observes that "[w]ere we to accept Day's position, courts would never (or, at least, hardly ever) be positioned to raise AEDPA's [Antiterrorism and Effective Death Penalty Act of 1996] time bar *sua sponte*," because "information essential to the time calculation is often absent" at the Rule 4 prescreening stage, *ante*, at 207, n. 6. But to be distressed at this phenomenon is to beg the question—that is, to assume that courts *ought* to "be positioned to raise AEDPA's time bar *sua sponte*." That is precisely the question before us.

Instead of identifying an inconsistency between habeas corpus practice and the usual civil forfeiture rule, the Court urges that "it would make scant sense to distinguish in this regard AEDPA's time bar from other threshold constraints on federal habeas petitioners" that may be raised *sua sponte*—*ante*, at 209—namely, exhaustion of state remedies, procedural default, nonretroactivity, and (prior to AEDPA) abuse of the writ. See *Granberry* v. *Greer*, 481 U. S. 129, 133 (1987) (exhaustion); *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994) (nonretroactivity). But unlike AEDPA's statute of limitations, these defenses were all created by the habeas courts themselves, in the exercise of their traditional equitable discretion, see *Withrow* v. *Williams*, 507 U. S. 680, 717–718 (1993) (SCALIA, J., concurring in part and dissenting in part), because they were seen as necessary to protect the interests of comity and finality that federal collateral review of state criminal proceedings necessarily implicates. See *McCleskey* v. *Zant*, 499 U. S. 467, 489–491 (1991) (abuse of the writ); *Wainwright* v. *Sykes*, 433 U. S. 72, 80–81 (1977) (procedural default); *Teague* v. *Lane*, 489 U. S. 288, 308 (1989) (nonretroactivity); *Rose* v. *Lundy*, 455 U. S. 509, 515 (1982) (exhaustion of state remedies). Unlike these other defenses, no time limitation—not even equitable laches—was imposed to vindicate comity and finality. AEDPA's 1-year limitations period is entirely a recent creature of statute. See *ante*, at 202, n. 1. If comity and finality did not compel any time limitation at all, it follows *a fortiori* that they do not compel making a legislatively created, forfeitable time limitation *nonforfeitable.*

In fact, prior to the enactment of AEDPA, we affirmatively rejected the notion that habeas courts' traditionally broad discretionary powers would support their imposition of a time bar. Historically, "there [wa]s no statute of limitations governing federal habeas, and the only laches recognized [wa]s that which affects the State's ability to defend against the claims raised on habeas"—which was imposed by

Rule, and not until 1977. *Brecht* v. *Abrahamson*, 507 U. S. 619, 637 (1993); see also *United States* v. *Smith*, 331 U. S. 469, 475 (1947); 17A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4268.2, pp. 497–498 (2d ed. 1988) (hereinafter Wright & Miller). We repeatedly asserted that the passage of time alone could not extinguish the habeas corpus rights of a person subject to unconstitutional incarceration. See *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116, 123 (1956); *Chessman* v. *Teets*, 354 U. S. 156, 164–165 (1957). For better or for worse, this doctrine was so well entrenched that the lower courts regularly entertained petitions filed after even extraordinary delays. See, *e. g.*, *Hawkins* v. *Bennett*, 423 F. 2d 948, 949 (CA8 1970) (40 years); *Hamilton* v. *Watkins*, 436 F. 2d 1323, 1325 (CA5 1970) (at least 36 years); *Hannon* v. *Maschner*, 845 F. 2d 1553, 1553–1555 (CA10 1988) (at least 24 years). And in 1977, when enactment of the former Habeas Rule 9(a) "introduce[d] for the first time an element of laches into habeas corpus," 17A Wright & Miller §4268.2, at 498—by adopting the rule against "'prejudicial delay'" to which the Court refers, *ante*, at 202, n. 1—even that limited doctrine was treated as subject to the very same pleading requirements and forfeiture rule that the Court rejects today for the stricter limitations period of §2244(d). See *Smith* v. *Secretary of New Mexico Dept. of Corrections*, 50 F. 3d 801, 821–822, n. 30 (CA10 1995); see also *McDonnell* v. *Estelle*, 666 F. 2d 246, 249 (CA5 1982).

There is, therefore, no support for the notion that the traditional equitable discretion that governed habeas proceedings permitted the dismissal of habeas petitions on the sole ground of untimeliness. Whether or not it should have, see *Collins* v. *Byrd*, 510 U. S. 1185, 1186–1187 (1994) (SCALIA, J., dissenting), it did not. The Court's reliance on pre-existing equitable doctrines like procedural default and nonretroactivity is, therefore, utterly misplaced. Nothing in our tradition of *refusing* to dismiss habeas petitions as untimely justifies the Court's decision to beef up the presumptively forfeitable "limitations period" of § 2244(d) by making it the subject of *sua sponte* dismissal.

In what appears to be the chief ground of its decision, the Court also observes that "the Magistrate Judge, instead of acting *sua sponte,* might have informed the State of its obvious computation error and entertained an amendment to the State's answer" under Civil Rule 15(a). *Ante,* at 209. Although "an amendment to the State's answer might have obviated this controversy," the Court concedes, "we see no dispositive difference between that route, and the one taken here." *Ibid.* But this consideration cuts in the opposite direction. If there truly were no "dispositive difference" between following and disregarding the rules that Congress has enacted, the natural conclusion would be that there is no compelling reason to *disregard* the Civil Rules.[2] Legislatively enacted rules are surely entitled to more respect than this apparent presumption that, when nothing substantial hangs on the point, they do *not* apply as written. And, unlike the novel regime that the Court adopts today, which will apparently require the development of new rules from scratch, there already exists a well-developed body of law to govern the district courts' exercise of discretion under Rule

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[2] I agree with the Court that today's decision will have little impact on the outcome of district court proceedings. In particular, I agree that "if a [district] judge does detect a clear computation error, no Rule, statute, or constitutional provision commands the judge to suppress that knowledge," *ante,* at 210. Rather, a judge may call the timeliness issue to the State's attention and invite a motion to amend the pleadings under Civil Rule 15(a), under which "leave shall be freely given when justice so requires." In fact, in providing for leave whenever "justice so requires," Rule 15(a), the Civil Rules fully accommodate the comity and finality interests that the Court thinks require a departure from the Civil Rules, see *ante,* at 206, 210. Requiring the State to take the affirmative step of amending its own pleading at least observes the formalities of our adversary system, which is a nontrivial value in itself. See *United States* v. *Burke,* 504 U. S. 229, 246 (1992) (SCALIA, J., concurring in judgment).

15(a). See 6 Wright & Miller §§ 1484–1488 (2d ed. 1990 and Supp. 2005). Ockham is offended by today's decision, even if no one else is.

But, in fact, there are at least two notable differences between the Civil Rules and the *sua sponte* regime of such cases as *Granberry* and *Caspari*—both of which involve sufficiently significant departures from ordinary civil practice as to require clear authorization from the statute, the Rules, or historical habeas practice. First, the *Granberry* regime allows the forfeited procedural defense to be raised for the first time on appeal, either by the State or by the appellate court *sua sponte.* See 481 U. S., at 130, 133; *Schiro* v. *Farley,* 510 U. S. 222, 228–229 (1994). Ordinary civil practice does not allow a forfeited affirmative defense whose underlying facts were not developed below to be raised for the first time on appeal. See *Weinberger* v. *Salfi,* 422 U. S. 749, 764 (1975); *Metropolitan Housing Development Corp.* v. *Arlington Heights,* 558 F. 2d 1283, 1287 (CA7 1977). The ability to raise even constitutional errors in criminal trials for the first time on appeal is narrowly circumscribed. See Fed. Rule Crim. Proc. 52(b); *United States* v. *Olano,* 507 U. S. 725, 732 (1993). Comity and finality justified this departure from ordinary practice for historically rooted equitable defenses such as exhaustion. See *Granberry, supra,* at 134. But limitations was not such a defense.

Also, *Granberry* and the like raise the possibility that the courts can impose a procedural defense over the State's affirmative decision to waive that defense. The Court takes care to point out that this is not such a case, *ante,* at 210–211, but it invites such cases in the future. After all, the principal justification for allowing such defenses to be raised *sua sponte* is that they "'implicat[e] values beyond the concerns of the parties,'" including "'judicial efficiency and conservation of judicial resources'" and "the expeditious handling of habeas proceedings." *Ante,* at 205, 208 (quoting *Acosta* v. *Artuz,* 221 F. 3d 117, 123 (CA2 2000)). There are many reasons why the State may wish to disregard the statute of limitations, including the simple belief that it would be unfair to impose the limitations defense on a particular defendant. On the Court's reasoning, a district court would not abuse its discretion in overriding the State's conscious waiver of the defense in order to protect such " 'values beyond the concerns of the parties,' " *ante,* at 205.[3] Under the Civil Rules, by contrast, amending a party's pleading over his objection would constitute a clear abuse of the trial court's discretion.

In sum, applying the ordinary rule of forfeiture to the AEDPA statute of limitations creates no inconsistency with the Habeas Rules. On the contrary, it is the Court's unwarranted expansion of the timeliness rule enacted by Congress that is inconsistent with the statute, the Habeas Rules, the Civil Rules, and traditional practice. I would hold that the ordinary forfeiture rule, as codified in the Civil Rules, applies to the limitations period of § 2244(d). I respectfully dissent.

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[3] In order to avoid this seemingly unavoidable conclusion, the Court asserts, without relevant citation or reasoning, that "should a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice." *Ante,* at 210, n. 11. This assertion is contrary to our statement in *Granberry* v. *Greer,* 481 U. S. 129, 134 (1987)—a case which, on the Court's view, it makes "scant sense to distinguish," *ante,* at 209—that an appellate court may dismiss an unexhausted petition *sua sponte* in "cases in which the State fails, *whether inadvertently or otherwise,* to raise an arguably meritorious nonexhaustion defense." (Emphasis added.) To support its assertion, the Court cites nothing but its own earlier statement: "Ordinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto. Fed. Rules Civ. Proc. 8(c), 12(b), and 15(a). And we would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense." *Ante,* at 202. But as the statement itself shows, the "ordinary" inability to override the State's "intelligent" waiver is coupled with an "ordinary" automatic forfeit of the defense if it is not timely raised. The Court does not say why it makes sense, for the statute of limitations of §2244(d)(1)(A), to reject (as it does) the first part of the ordinary practice (automatic forfeiture), while embracing the second (inability to override intelligent waiver). The *reason* for rejecting the first part surely applies just as well to the second: Section 2244(d)(1)(A) supposedly " 'implicate[s] values beyond the concerns of the parties,' " including " 'judicial efficiency,' " " 'conservation of judicial resources,' " and "expeditious handling of habeas proceedings." *Ante,* at 205, 208.

# JONES *v.* FLOWERS ET AL.

## CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 04–1477. Argued January 17, 2006—Decided April 26, 2006

Petitioner Jones continued to pay the mortgage on his Arkansas home after separating from his wife and moving elsewhere in the same city. Once the mortgage was paid off, the property taxes—which had been paid by the mortgage company—went unpaid, and the property was certified as delinquent. Respondent Commissioner of State Lands mailed Jones a certified letter at the property's address, stating that unless he redeemed the property, it would be subject to public sale in two years. Nobody was home to sign for the letter and nobody retrieved it from the post office within 15 days, so it was returned to the Commissioner, marked "unclaimed." Two years later, the Commissioner published a notice of public sale in a local newspaper. No bids were submitted, so the State negotiated a private sale to respondent Flowers. Before selling the house, the Commissioner mailed another certified letter to Jones, which was also returned unclaimed. Flowers purchased the house and had an unlawful detainer notice delivered to the property. It was served on Jones' daughter, who notified him of the sale. He filed a state-court suit against respondents, alleging that the Commissioner's failure to provide adequate notice resulted in the taking of his property without due process. Granting respondents summary judgment, the trial court concluded that Arkansas' tax sale statute, which sets out the notice procedure used here, complied with due process. The State Supreme Court affirmed.

*Held:*

1. When mailed notice of a tax sale is returned unclaimed, a State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so. Pp. 226–234.

(a) This Court has deemed notice constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent, see, *e. g., Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306, 314, but has never addressed whether due process requires further efforts when the government becomes aware prior to the taking that its notice attempt has failed. Most Courts of Appeals and State Supreme Courts addressing this question have decided that the government must do more in such a case, and many state statutes require more than mailed notice in the first instance. Pp. 226–228.

(b) The means a State employs to provide notice "must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U. S., at 315. The adequacy of a particular form of notice is assessed by balancing the State's interest against "the individual interest sought to be protected by the Fourteenth Amendment." *Id.*, at 314. Here, the evaluation concerns the adequacy of notice prior to the State's extinguishing a property owner's interest in a home. It is unlikely that a person who actually desired to inform an owner about an impending tax sale of a house would do nothing when a certified letter addressed to the owner is returned unclaimed. The sender would ordinarily attempt to resend the letter, if that is practical, especially given that it concerns the important and irreversible prospect of losing a house. The State may have made a reasonable calculation of how to reach Jones, but it had good reason to suspect when the notice was returned that Jones was no better off than if no notice had been sent. The government must consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case. See *Robinson* v. *Hanrahan*, 409 U. S. 38, 40 *(per curiam)*, and *Covey* v. *Town of Somers*, 351 U. S. 141, 146–147. It does not matter that the State in each of those cases was aware of the information *before* it calculated the best way to send notice. Knowledge that notice was ineffective was one of the "practicalities and peculiarities of the case" taken into account, *Mullane*, *supra*, at 314–315, and it should similarly be taken into account in assessing the adequacy of notice here. The Commissioner and Solicitor General correctly note that the constitutionality of a particular notice procedure is assessed *ex ante*, not *post hoc*. But if a feature of the State's procedure is that it promptly provides additional information to the government about the effectiveness of attempted notice, the *ex ante* principle is not contravened by considering what the government does with that information. None of the Commissioner's additional contentions—that notice was sent to an address that Jones provided and had a legal obligation to keep updated, that a property owner who fails to receive a property tax bill and pay taxes is on inquiry notice that his property is subject to governmental taking, and that Jones was obliged to ensure that those in whose hands he left his property would alert him if it was in jeopardy—relieves the State of its constitutional obligation to provide adequate notice. Pp. 229–234.

2. Because additional reasonable steps were available to the State, given the circumstances here, the Commissioner's effort to provide notice to Jones was insufficient to satisfy due process. What is reasonable

in response to new information depends on what that information reveals. The certified letter's return "unclaimed" meant either that Jones was not home when the postman called and did not retrieve the letter or that he no longer resided there. One reasonable step addressed to the former possibility would be for the State to resend the notice by regular mail, which requires no signature. Certified mail makes actual notice more likely only if someone is there to sign for the letter or tell the mail carrier that the address is incorrect. Regular mail can be left until the person returns home, and might increase the chances of actual notice. Other reasonable followup measures would have been to post notice on the front door or address otherwise undeliverable mail to "occupant." Either approach would increase the likelihood that any occupants would alert the owner, if only because an ownership change could affect their own occupancy. Contrary to Jones' claim, the Commissioner was not required to search the local phone book and other government records. Such an open-ended search imposes burdens on the State significantly greater than the several relatively easy options outlined here. The Commissioner's complaint about the burden of even these additional steps is belied by Arkansas' requirement that notice to homestead owners be accomplished by personal service if certified mail is returned and by the fact that the State transfers the cost of notice to the taxpayer or tax sale purchaser. The Solicitor General's additional arguments—that posted notice could be removed by children or vandals, and that the followup requirement will encourage States to favor modes of delivery that will not generate additional information—are rejected. This Court will not prescribe the form of service that Arkansas should adopt. Arkansas can determine how best to proceed, and the States have taken a variety of approaches. Pp. 234–238.

359 Ark. 443, 198 S. W. 3d 520, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA and KENNEDY, JJ., joined, *post*, p. 239. ALITO, J., took no part in the consideration or decision of the case.

*Michael T. Kirkpatrick* argued the cause for petitioner. With him on the briefs was *Brian Wolfman*.

*Carter G. Phillips* argued the cause for respondents. With him on the brief for respondent Commissioner of State Lands was *Virginia A. Seitz*. *A. J. Kelly* filed a brief for respondent Flowers.

*James A. Feldman* argued the cause for the United States as *amicus curiae* in support of respondents. With him on the brief were *Solicitor General Clement, Acting Assistant Attorney General Katsas, Deputy Solicitor General Hungar, Michael Jay Singer,* and *Susan Maxson Lyons.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner "notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). We granted certiorari to determine whether, when notice of a tax sale is mailed to the owner and returned undelivered, the government must take additional reasonable steps to provide notice before taking the owner's property.

## I

In 1967, petitioner Gary Jones purchased a house at 717 North Bryan Street in Little Rock, Arkansas. He lived in the house with his wife until they separated in 1993. Jones then moved into an apartment in Little Rock, and his wife continued to live in the North Bryan Street house. Jones paid his mortgage each month for 30 years, and the mortgage company paid Jones' property taxes. After Jones paid off his mortgage in 1997, the property taxes went unpaid, and the property was certified as delinquent.

In April 2000, respondent Mark Wilcox, the Commissioner of State Lands (Commissioner), attempted to notify Jones of his tax delinquency, and his right to redeem the property, by mailing a certified letter to Jones at the North Bryan Street address. See Ark. Code Ann. §26–37–301 (1997). The packet of information stated that unless Jones redeemed the property, it would be subject to public sale two years later on April 17, 2002. See *ibid.* Nobody was home to sign for the letter, and nobody appeared at the post office to retrieve the letter within the next 15 days. The post office returned the unopened packet to the Commissioner marked "'unclaimed.'" Pet. for Cert. 3.

Two years later, and just a few weeks before the public sale, the Commissioner published a notice of public sale in the Arkansas Democrat Gazette. No bids were submitted, which permitted the State to negotiate a private sale of the property. See § 26–37–202(b). Several months later, respondent Linda Flowers submitted a purchase offer. The Commissioner mailed another certified letter to Jones at the North Bryan Street address, attempting to notify him that his house would be sold to Flowers if he did not pay his taxes. Like the first letter, the second was also returned to the Commissioner marked "unclaimed." Pet. for Cert. 3. Flowers purchased the house, which the parties stipulated in the trial court had a fair market value of $80,000, for $21,042.15. Record 224. Immediately after the 30-day period for postsale redemption passed, see § 26–37–202(e), Flowers had an unlawful detainer notice delivered to the property. The notice was served on Jones' daughter, who contacted Jones and notified him of the tax sale. *Id.*, at 11 (Exh. B).

Jones filed a lawsuit in Arkansas state court against the Commissioner and Flowers, alleging that the Commissioner's failure to provide notice of the tax sale and of Jones' right to redeem resulted in the taking of his property without due process. The Commissioner and Flowers moved for summary judgment on the ground that the two unclaimed letters sent by the Commissioner were a constitutionally adequate attempt at notice, and Jones filed a cross-motion for summary judgment. The trial court granted summary judgment in favor of the Commissioner and Flowers. App. to Pet. for Cert. 12a–13a. It concluded that the Arkansas tax sale statute, which set forth the notice procedure followed by the Commissioner, complied with constitutional due process requirements.

Jones appealed, and the Arkansas Supreme Court affirmed the trial court's judgment. 359 Ark. 443, 198 S. W. 3d 520 (2004). The court noted our precedent stating that due process does not require actual notice, see *Dusenbery* v. *United States*, 534 U. S. 161, 170 (2002), and it held that attempting to provide notice by certified mail satisfied due process in the circumstances presented, 359 Ark., at 453–454, 198 S. W. 3d, at 526–527.

We granted certiorari, 545 U. S. 1165 (2005), to resolve a conflict among the Circuits and State Supreme Courts concerning whether the Due Process Clause requires the government to take additional reasonable steps to notify a property owner when notice of a tax sale is returned undelivered. Compare, *e. g., Akey* v. *Clinton County*, 375 F. 3d 231, 236 (CA2 2004) ("In light of the notice's return, the County was required to use 'reasonably diligent efforts' to ascertain Akey's correct address"), and *Kennedy* v. *Mossafa*, 100 N. Y. 2d 1, 9, 789 N. E. 2d 607, 611 (2003) ("[W]e reject the view that the enforcing officer's obligation is always satisfied by sending the notice to the address listed in the tax roll, even where the notice is returned as undeliverable"), with *Smith* v. *Cliffs on the Bay Condominium Assn.*, 463 Mich. 420, 429, 617 N. W. 2d 536, 541 (2000) *(per curiam)* ("The fact that one of the mailings was returned by the post office as undeliverable does not impose on the state the obligation to undertake an investigation to see if a new address . . . could be located"). We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so. Under the circumstances presented here, additional reasonable steps were available to the State. We therefore reverse the judgment of the Arkansas Supreme Court.

## II

### A

Due process does not require that a property owner receive actual notice before the government may take his property. *Dusenbery, supra,* at 170. Rather, we have stated that due process requires the government to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane,* 339 U. S., at 314. The Commissioner argues that once the State provided notice reasonably calculated to apprise Jones of the impending tax sale by mailing him a certified letter, due process was satisfied. The Arkansas statutory scheme is reasonably calculated to provide notice, the Commissioner continues, because it provides for notice by certified mail to an address that the property owner is responsible for keeping up to date. See Ark. Code Ann. § 26–35–705 (1997). The Commissioner notes this Court's ample precedent condoning notice by mail, see, *e. g., Dusenbery, supra,* at 169; *Tulsa Professional Collection Services, Inc.* v. *Pope,* 485 U. S. 478, 490 (1988); *Mennonite Bd. of Missions* v. *Adams,* 462 U. S. 791, 798 (1983); *Mullane, supra,* at 318–319, and adds that the Arkansas scheme exceeds constitutional requirements by requiring the Commissioner to use certified mail. Brief for Respondent Commissioner 14–15.

It is true that this Court has deemed notice constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent. See, *e. g., Dusenbery, supra,* at 168–169; *Mullane,* 339 U. S., at 314. In each of these cases, the government attempted to provide notice and heard nothing back indicating that anything had gone awry, and we stated that "[t]he reasonableness and hence the constitutional validity of [the] chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." *Id.*, at 315; see also *Dusenbery, supra,* at

170. But we have never addressed whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed. That is a new wrinkle, and we have explained that the "notice required will vary with circumstances and conditions." *Walker* v. *City of Hutchinson,* 352 U. S. 112, 115 (1956). The question presented is whether such knowledge on the government's part is a "circumstance and condition" that varies the "notice required."

The Courts of Appeals and State Supreme Courts have addressed this question on frequent occasions, and most have decided that when the government learns its attempt at notice has failed, due process requires the government to do something more before real property may be sold in a tax sale.[1] See, *e. g., Plemons* v. *Gale,* 396 F. 3d 569, 576 (CA4 2005); *Akey, supra,* at 236; *Hamilton* v. *Renewed Hope, Inc.,* 277 Ga. 465, 468, 589 S. E. 2d 81, 85 (2003); *Kennedy, supra,* at 9, 789 N. E. 2d, at 611; *Malone* v. *Robinson,* 614 A. 2d 33, 38 (D. C. App. 1992) *(per curiam); St. George Antiochian Orthodox Christian Church* v. *Aggarwal,* 326 Md. 90, 103, 603 A. 2d 484, 490 (1992); *Wells Fargo Credit Corp.* v. *Ziegler,* 780 P. 2d 703, 705 (Okla. 1989); *Rosenberg* v. *Smidt,* 727 P. 2d 778, 780–783 (Alaska 1986); *Giacobbi* v. *Hall,*

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[1] Most Courts of Appeals have also concluded that the Due Process Clause of the Fifth Amendment requires the Federal Government to take further reasonable steps in the property forfeiture context. See, *e. g., United States* v. *Ritchie,* 342 F. 3d 903, 911 (CA9 2003); *Foehl* v. *United States,* 238 F. 3d 474, 480 (CA3 2001); *Small* v. *United States,* 136 F. 3d 1334, 1337–1338 (CADC 1998); *Torres* v. *$36,256.80 U. S. Currency,* 25 F. 3d 1154, 1161 (CA2 1994); *Barrera-Montenegro* v. *United States,* 74 F. 3d 657, 660 (CA5 1996); *United States* v. *Rodgers,* 108 F. 3d 1247, 1252–1253 (CA10 1997); see also *Garcia* v. *Meza,* 235 F. 3d 287, 291 (CA7 2000) (declining to adopt a *per se* rule that only examines notice at the time it is sent, but also declining to impose an affirmative duty to seek out claimants in every case where notice is returned undelivered). But see *Madewell* v. *Downs,* 68 F. 3d 1030, 1047 (CA8 1995); *Sarit* v. *United States Drug Enforcement Admin.,* 987 F. 2d 10, 14–15 (CA1 1993).

109 Idaho 293, 297, 707 P. 2d 404, 408 (1985); *Tracy* v. *County of Chester, Tax Claim Bureau,* 507 Pa. 288, 296, 489 A. 2d 1334, 1338–1339 (1985). But see *Smith,* 463 Mich., at 429, 617 N. W. 2d, at 541; *Dahn* v. *Trownsell,* 1998 SD 36, ¶ 23, 576 N. W. 2d 535, 541–542; *Elizondo* v. *Read,* 588 N. E. 2d 501, 504 (Ind. 1992); *Atlantic City* v. *Block C–11, Lot 11,* 74 N. J. 34, 39–40, 376 A. 2d 926, 928 (1977). Many States already require in their statutes that the government do more than simply mail notice to delinquent owners, either at the outset or as a followup measure if initial mailed notice is ineffective.[2]

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[2] Many States require that notice be given to the occupants of the property as a matter of course. See Cal. Rev. & Tax. Code Ann. § 3704.7 (West Supp. 2006); Ga. Code Ann. § 48–4–45(a)(1)(B) (Supp. 2005); Ill. Comp. Stat., ch. 35, §§ 200/21–75(a), 200/22–10, 200/22–15 (West 2005); Me. Rev. Stat. Ann., Tit. 36, § 1073 (1990); Md. Tax-Prop. Code Ann. § 14–836(b)(4)(i)(2) (Lexis 2001); Mich. Comp. Laws Ann. § 211.78i(3) (West 2005); Minn. Stat. § 281.23, subd. 6 (2004); Mont. Code Ann. §§ 15–18–212(1)(a), (2)(a) (2005); N. D. Cent. Code Ann. § 57–28–04(3) (Lexis 2005); Okla. Stat., Tit. 68, § 3118(A) (West Supp. 2006); S. D. Codified Laws § 10–25–5 (2004); Utah Code Ann. § 59–2–1351(2)(a) (Lexis 2004); Wis. Stat. § 75.12(1) (2003–2004); Wyo. Stat. Ann. § 39–13–108(e)(v)(B) (1997–2005). Some States require that notice be posted on the property or at the property owner's last known address either at the outset, see Del. Code Ann., Tit. 9, §§ 8724, 8772 (1989 and Supp. 2004); Ga. Code Ann. § 48–4–78(d) (Supp. 2005); Haw. Rev. Stat. Ann. § 246–56 (2003); Md. Tax-Prop. Code Ann. § 14–836(b)(6) (Lexis 2001); Okla. Stat., Tit. 68, § 3118(A), or as a followup measure when personal service cannot be accomplished or certified mail is returned, see Fla. Stat. § 197.522(2)(a) (2003); Minn. Stat. § 281.23, subd. 6; S. C. Code Ann. § 12–51–40(c) (Supp. 2005). And a few States require a diligent inquiry to find a property owner's correct address when mailed notice is returned. See Miss. Code Ann. § 27–43–3 (1973–2002); Nev. Rev. Stat. § 361.595(3)(b) (2003); Pa. Stat. Ann., Tit. 72, § 5860.607a (Purdon 1990); R. I. Gen. Laws § 44–9–25.1 (2005).

See also 26 U. S. C. § 6335(a) (requiring the Internal Revenue Service to make a reasonable attempt to personally serve notice on a delinquent taxpayer before relying upon notice by certified mail); 28 U. S. C. § 3203(g)(1)(A)(i)(IV) (requiring written notice to tenants of real property subject to sale under the Federal Debt Collection Procedures Act of 1990); 12 U. S. C. § 3758(2)(A)(iii) (requiring written notice to occupants before

In *Mullane,* we stated that "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," 339 U. S., at 315, and that assessing the adequacy of a particular form of notice requires balancing the "interest of the State" against "the individual interest sought to be protected by the Fourteenth Amendment," *id.,* at 314. Our leading cases on notice have evaluated the adequacy of notice given to beneficiaries of a common trust fund, *Mullane, supra;* a mortgagee, *Mennonite,* 462 U. S. 791; owners of seized cash and automobiles, *Dusenbery,* 534 U. S. 161; *Robinson* v. *Hanrahan,* 409 U. S. 38 (1972) *(per curiam);* creditors of an estate, *Tulsa Professional,* 485 U. S. 478; and tenants living in public housing, *Greene* v. *Lindsey,* 456 U. S. 444 (1982). In this case, we evaluate the adequacy of notice prior to the State extinguishing a property owner's interest in a home.

We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed. If the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again. No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried." Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman.

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foreclosure by the Secretary of Housing and Urban Development); §3758(2)(B)(ii) (requiring that notice be posted on the property if occupants are unknown).

By the same token, when a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so. See *Small* v. *United States*, 136 F. 3d 1334, 1337 (CADC 1998). This is especially true when, as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house. Although the State may have made a reasonable calculation of how to reach Jones, it had good reason to suspect when the notice was returned that Jones was "no better off than if the notice had never been sent." *Malone*, 614 A. 2d, at 37. Deciding to take no further action is not what someone "desirous of actually informing" Jones would do; such a person would take further reasonable steps if any were available.

In prior cases, we have required the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case. In *Robinson* v. *Hanrahan*, we held that notice of forfeiture proceedings sent to a vehicle owner's home address was inadequate when the State knew that the property owner was in prison. 409 U. S., at 40. In *Covey* v. *Town of Somers*, 351 U. S. 141 (1956), we held that notice of foreclosure by mailing, posting, and publication was inadequate when town officials knew that the property owner was incompetent and without a guardian's protection. *Id.*, at 146–147.

The Commissioner points out that in these cases, the State was aware of such information *before* it calculated how best to provide notice. But it is difficult to explain why due process would have settled for something less if the government had learned after notice was sent, but before the taking occurred, that the property owner was in prison or was incompetent. Under *Robinson* and *Covey*, the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice. That knowledge was one of the "practicalities and peculiarities of the case," *Mullane, supra,* at 314–315, that the Court took into account in determining whether constitutional requirements were met. It should similarly be taken into account in assessing the adequacy of notice in this case. The dissent dismisses the State's knowledge that its notice was ineffective as "learned long after the fact," *post,* at 246, n. 5 (opinion of THOMAS, J.), but the notice letter was promptly returned to the State two to three weeks after it was sent, and the Arkansas statutory regime precludes the State from taking the property for two *years* while the property owner may exercise his right to redeem, see Ark. Code Ann. §26–37–301 (Supp. 2005).

It is certainly true, as the Commissioner and Solicitor General contend, that the failure of notice in a specific case does not establish the inadequacy of the attempted notice; in that sense, the constitutionality of a particular procedure for notice is assessed *ex ante,* rather than *post hoc.* But if a feature of the State's chosen procedure is that it promptly provides additional information to the government about the effectiveness of notice, it does not contravene the *ex ante* principle to consider what the government does with that information in assessing the adequacy of the chosen procedure. After all, the State knew *ex ante* that it would promptly learn whether its effort to effect notice through certified mail had succeeded. It would not be inconsistent with the approach the Court has taken in notice cases to ask, with respect to a procedure under which telephone calls were placed to owners, what the State did when no one answered. Asking what the State does when a notice letter is returned unclaimed is not substantively different.

The Commissioner has three further arguments for why reasonable followup measures were not required in this case. First, notice was sent to an address that Jones provided and had a legal obligation to keep updated. See Ark. Code Ann. §26–35–705 (1997). Second, "after failing to receive a property tax bill and pay property taxes, a property holder is on inquiry-notice that his property is subject to governmental taking." Brief for Respondent Commissioner 18–19. Third, Jones was obliged to ensure that those in whose hands he left his property would alert him if it was in jeopardy. None of these contentions relieves the State of its constitutional obligation to provide adequate notice.

The Commissioner does not argue that Jones' failure to comply with a statutory obligation to keep his address updated forfeits his right to constitutionally sufficient notice, and we agree. *Id.*, at 19; see also Brief for United States as *Amicus Curiae* 16, n. 5 ("'[A] party's ability to take steps to safeguard its own interests does not relieve the State of its constitutional obligation'" (quoting *Mennonite*, 462 U. S., at 799)). In *Robinson*, we noted that Illinois law required each vehicle owner to register his address with the secretary of state, and that the State's vehicle forfeiture scheme provided for notice by mail to the address listed in the secretary's records. See 409 U. S., at 38, n. 1 (citing Ill. Rev. Stat., ch. 95½, §3–405 (1971), and ch. 38, §36–1 (1969)). But we found that the State had not provided constitutionally sufficient notice, despite having followed its reasonably calculated scheme, because it knew that Robinson could not be reached at his address of record. 409 U. S., at 39–40. Although Ark. Code Ann. §26–35–705 provides strong support for the Commissioner's argument that mailing a certified letter to Jones at 717 North Bryan Street was reasonably calculated to reach him, it does not alter the reasonableness of the Commissioner's position that he must do nothing more when the notice is promptly returned "unclaimed."

As for the Commissioner's inquiry notice argument, the common knowledge that property may become subject to government taking when taxes are not paid does not excuse the government from complying with its constitutional obligation of notice before taking private property. We have previously stated the opposite: An interested party's "knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending." *Mennonite, supra,* at 800. It is at least as widely known that arrestees have the right to remain silent, and that anything they say may be used against them, see *Dickerson* v. *United States,* 530 U. S. 428, 443 (2000) ("*Miranda* [v. *Arizona,* 384 U. S. 436 (1966),] has become embedded in routine police practice to the point where the warnings have become part of our national culture"), but that knowledge does not excuse a police failure to provide *Miranda* warnings. Arkansas affords even a delinquent taxpayer the right to settle accounts with the State and redeem his property, so Jones' failure to pay his taxes in a timely manner cannot by itself excuse inadequate notice.

Finally, the Commissioner reminds us of a statement from *Mullane* that the State can assume an owner leaves his property in the hands of one who will inform him if his interest is in jeopardy. 339 U. S., at 316. But in this passage, Justice Jackson writes of "libel of a ship, attachment of a chattel[,] or entry upon real estate in the name of law"—such "seiz[ures]" of property, he concluded, "may reasonably be expected to come promptly to the owner's attention." *Ibid.* An occupant, however, is not charged with acting as the owner's agent in all respects, and it is quite a leap from Justice Jackson's examples to conclude that it is an obligation of tenancy to follow up with certified mail of unknown content addressed to the owner. In fact, the State makes it impossible for the occupant to learn why the Commissioner is writing the owner, because an occupant cannot call for a certified letter without first obtaining the owner's signature. For all the occupant knows, the Commissioner of State Lands might write to certain residents about a variety of matters he finds important, such as state parks or highway construction; it would by no means be obvious to an occupant observing a certified mail slip from the Commissioner that the owner is in danger of losing his property. In any event, there is no record evidence that notices of attempted delivery were left at 717 North Bryan Street.

Jones should have been more diligent with respect to his property, no question. People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property. But before forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking. U. S. Const., Amdt. 14; *Mennonite*, *supra*, at 799.

### B

In response to the returned form suggesting that Jones had not received notice that he was about to lose his property, the State did—nothing. For the reasons stated, we conclude the State should have taken additional reasonable steps to notify Jones, if practicable to do so. The question remains whether there were any such available steps. While "[i]t is not our responsibility to prescribe the form of service that the [government] should adopt," *Greene*, 456 U. S., at 455, n. 9, if there were no reasonable additional steps the government could have taken upon return of the unclaimed notice letter, it cannot be faulted for doing nothing.

We think there were several reasonable steps the State could have taken. What steps are reasonable in response to new information depends upon what the new information reveals. The return of the certified letter marked "unclaimed" meant either that Jones still lived at 717 North Bryan Street, but was not home when the postman called and did not retrieve the letter at the post office, or that Jones no longer resided at that address. One reasonable step primarily addressed to the former possibility would be for the State to resend the notice by regular mail, so that a signature was not required. The Commissioner says that use of certified mail makes actual notice more likely, because requiring the recipient's signature protects against misdelivery. But that is only true, of course, when someone is home to sign for the letter, or to inform the mail carrier that he has arrived at the wrong address. Otherwise, "[c]ertified mail is dispatched and handled in transit as ordinary mail," United States Postal Service, Domestic Mail Manual §503.3.2.1 (Mar. 16, 2006), and the use of certified mail might make actual notice less likely in some cases—the letter cannot be left like regular mail to be examined at the end of the day, and it can only be retrieved from the post office for a specified period of time. Following up with regular mail might also increase the chances of actual notice to Jones if—as it turned out—he had moved. Even occupants who ignored certified mail notice slips addressed to the owner (if any had been left) might scrawl the owner's new address on the notice packet and leave it for the postman to retrieve, or notify Jones directly.

Other reasonable followup measures, directed at the possibility that Jones had moved as well as that he had simply not retrieved the certified letter, would have been to post notice on the front door, or to address otherwise undeliverable mail to "occupant." Most States that explicitly outline additional procedures in their tax sale statutes require just such steps. See n. 2, *supra*. Either approach would increase the likelihood that the owner would be notified that he was about to lose his property, given the failure of a letter deliverable only to the owner in person. That is clear in the case of an owner who still resided at the premises. It is also true in the case of an owner who has moved: Occupants who might disregard a certified mail slip not addressed to them are less likely to ignore posted notice, and a letter addressed to them (even as "occupant") might be opened and read. In either case, there is a significant chance the occupants will alert the owner, if only because a change in ownership could well affect their own occupancy. In fact, Jones first learned of the State's effort to sell his house when he was alerted by one of the occupants—his daughter—after she was served with an unlawful detainer notice.

Jones believes that the Commissioner should have searched for his new address in the Little Rock phonebook and other government records such as income tax rolls. We do not believe the government was required to go this far. As the Commissioner points out, the return of Jones' mail marked "unclaimed" did not necessarily mean that 717 North Bryan Street was an incorrect address; it merely informed the Commissioner that no one appeared to sign for the mail before the designated date on which it would be returned to the sender. An open-ended search for a new address—especially when the State obligates the taxpayer to keep his address updated with the tax collector, see Ark. Code Ann. §26–35–705 (1997)—imposes burdens on the State significantly greater than the several relatively easy options outlined above.

The Commissioner complains about the burden of even those additional steps, but his argument is belied by Arkansas' current requirement that notice to homestead owners be accomplished by personal service if certified mail is returned, §26–37–301(e) (Supp. 2005), and the fact that Arkansas transfers the cost of notice to the taxpayer or the tax sale purchaser, §26–37–104(a). The Commissioner has offered no estimate of how many notice letters are returned, and no facts to support the dissent's assertion that the Commissioner must now physically locate "tens of thousands of properties every year." *Post,* at 248. Citing our decision in *Greene* v. *Lindsey,* the Solicitor General adds that posted notice could be taken down by children or vandals. But in *Greene,* we noted that outside the specific facts of that case, posting notice on real property is "a singularly appropriate and effective way of ensuring that a person . . . is actually apprised of proceedings against him." 456 U. S., at 452–453. Successfully providing notice is often the most efficient way to collect unpaid taxes, see *Mennonite,* 462 U. S., at 800, n. 5 (more effective notice may ease burden on State if recipient arranges to pay delinquent taxes prior to tax sale); Tr. of Oral Arg. 24 (85 percent of tax delinquent properties in Arkansas are redeemed upon notice of delinquency), but rather than taking relatively easy additional steps to effect notice, the State undertook the burden and expense of purchasing a newspaper advertisement, conducting an auction, and then negotiating a private sale of the property to Flowers.

The Solicitor General argues that requiring further effort when the government learns that notice was not delivered will cause the government to favor modes of providing notice that do not generate additional information—for example, starting (and stopping) with regular mail instead of certified mail. We find this unlikely, as we have no doubt that the government repeatedly finds itself being asked to prove that notice was sent and received. Using certified mail provides the State with documentation of personal delivery and protection against false claims that notice was never received. That added security, however, comes at a price—the State also learns when notice has *not* been received. We conclude that, under the circumstances presented, the State cannot simply ignore that information in proceeding to take and sell the owner's property—any more than it could ignore the information that the owner in *Robinson* was in jail, or that the owner in *Covey* was incompetent.

Though the Commissioner argues that followup measures are not constitutionally required, he reminds us that the State did make some attempt to follow up with Jones by publishing notice in the newspaper a few weeks before the public sale. Several decades ago, this Court observed that "[c]hance alone" brings a person's attention to "an advertisement in small type inserted in the back pages of a newspaper," *Mullane*, 339 U. S., at 315, and that notice by publication is adequate only where "it is not reasonably possible or practicable to give more adequate warning," *id.*, at 317. Following up by publication was not constitutionally adequate under the circumstances presented here because, as we have explained, it was possible and practicable to give Jones more adequate warning of the impending tax sale.

The dissent forcefully articulates some basic principles about constitutionally required notice, principles from which we have no intention to depart. In particular, we disclaim any "new rule" that is "contrary to *Dusenbery* and a significant departure from *Mullane.*" *Post,* at 244. In *Dusenbery,* the Government was aware that someone at the prison had signed for the prisoner's notice letter, and we determined that this attempt at notice was adequate, despite the fact that the State could have made notice more likely by requiring the prisoner to sign for the letter himself. 534 U. S., at 171. In this case, of course, the notice letter was returned to the Commissioner, informing him that his attempt at notice had failed.

As for *Mullane,* it directs that "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 U. S., at 315. Mindful of the dissent's concerns, we conclude, at the end of the day, that someone who actually wanted to alert Jones that he was in danger of losing his house would do more when the attempted notice letter was returned unclaimed, and there was more that reasonably could be done.

As noted, "[i]t is not our responsibility to prescribe the form of service that the [government] should adopt." *Greene, supra,* at 455, n. 9. In prior cases finding notice inadequate, we have not attempted to redraft the State's notice statute. See, *e. g., Tulsa Professional,* 485 U. S., at 490–491; *Robinson,* 409 U. S., at 40; *Schroeder* v. *City of New York,* 371 U. S. 208, 213–214 (1962); *Walker,* 352 U. S., at 116; *Covey,* 351 U. S., at 146–147. The State can determine how to proceed in response to our conclusion that notice was inadequate here, and the States have taken a variety of approaches to the present question. See n. 2, *supra.* It suffices for present purposes that we are confident that additional reasonable steps were available for Arkansas to employ before taking Jones' property.

* * *

There is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them. In this case, the State is exerting extraordinary power against a property owner—taking and selling a house he owns. It is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed.

The Commissioner's effort to provide notice to Jones of an impending tax sale of his house was insufficient to satisfy due process given the circumstances of this case. The judgment of the Arkansas Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE ALITO took no part in the consideration or decision of this case.

JUSTICE THOMAS, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, dissenting.

When petitioner failed to pay his property taxes for several consecutive years, respondent Commissioner of State Lands in Arkansas, using the record address that petitioner provided to the State, sent petitioner a letter by certified mail, noting his tax delinquency and explaining that his property would be subject to public sale if the delinquent taxes and penalties were not paid. After petitioner failed to respond, the State also published notice of the delinquency and public sale in an Arkansas newspaper. Soon after respondent Linda K. Flowers submitted a purchase offer to the State, it sent petitioner a second letter by certified mail explaining that the sale would proceed if the delinquent taxes and penalties were not paid.

Petitioner argues that the State violated his rights under the Due Process Clause of the Fourteenth Amendment because, in his view, the State failed to take sufficient steps to contact him before selling his property to Flowers. Petitioner contends that once the State became aware that he had not claimed the certified mail, it was constitutionally obligated to employ additional methods to locate him.

Adopting petitioner's arguments, the Court holds today that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Ante*, at 225. The Court concludes that it was practicable for Arkansas to take additional steps here—namely, notice by regular mail, posting notice on petitioner's door, and addressing mail to "'occupant.'" *Ante*, at 235. Because, under this Court's precedents, the State's notice methods clearly satisfy the requirements of the Due Process Clause, I respectfully dissent.

## I

The Fourteenth Amendment prohibits the States from "depriv[ing] any person of life, liberty, or property, without due process of law." This Court has held that a State must provide an individual with notice and opportunity to be heard before the State may deprive him of his property. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). Balancing a State's interest in efficiently managing its administrative system and an individual's interest in adequate notice, this Court has held that a State must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Id.*, at 313–314. As this Court has explained, "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.*, at 315. "[H]eroic efforts," however, are not required. *Dusenbery* v. *United States*, 534 U. S. 161, 170 (2002). To the contrary, we have expressly rejected "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way [of the State]." *Mullane, supra,* at 313–314. Thus, "none of our cases . . . has required actual notice"; instead, "we have allowed the Government to defend the 'reasonableness and hence the constitutional validity of any chosen method . . . on the ground that it is in itself reasonably certain to inform those affected.'" *Dusenbery, supra,* at 169–170 (quoting *Mullane, supra,* at 315).

The methods of notice employed by Arkansas were reasonably calculated to inform petitioner of proceedings affecting his property interest and thus satisfy the requirements of the Due Process Clause. The State mailed a notice by certified letter to the address provided by petitioner. The certified letter was returned to the State marked "unclaimed" after three attempts to deliver it. The State then published a notice of public sale containing redemption information in the Arkansas Democrat Gazette newspaper. After Flowers submitted a purchase offer, the State sent yet another certified letter to petitioner at his record address. That letter, too, was returned to the State marked "unclaimed" after three delivery attempts.[1]

Arkansas' attempts to contact petitioner by certified mail at his "record address," without more, satisfy due process.

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[1] Though the Court posits that "there is no record evidence that notices of attempted delivery were left at 717 North Bryan Street," *ante*, at 233, the postal carrier was required to leave notice at the address at each delivery attempt indicating that delivery of certified mail had been attempted and that the mail could be retrieved at the local post office. See United States Postal Operations Manual §813.25 (July 2002), http://www.nalc.org/depart/cau/pdf/manuals/pom/pomc8.pdf (all Internet materials as visited Apr. 21, 2006, and available in Clerk of Court's case file) ("The carrier must leave a notice of arrival on Form 3849 if the carrier cannot deliver the certified article for any reason").

*Dusenbery, supra,* at 169. See also *Mullane, supra,* at 318; *Tulsa Professional Collection Services, Inc.* v. *Pope,* 485 U. S. 478, 490 (1988) ("We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice"); *Mennonite Bd. of Missions* v. *Adams,* 462 U. S. 791, 792, 798 (1983) (holding that "notice *mailed* to [the affected party's] *last known available address*" is sufficient where a State seeks to sell "real property on which payments of property taxes have been delinquent" (emphasis added)). Because the notices were sent to the address provided by petitioner himself, the State had an especially sound basis for determining that notice would reach him. Moreover, Arkansas exceeded the constitutional minimum by additionally publishing notice in a local newspaper.[2] See *Mullane, supra,* at 318. Due process requires nothing more—and certainly not here, where petitioner had a statutory duty to pay his taxes and to report any change of address to the state taxing authority. See Ark. Code Ann. § 26–35–705 (1997).

My conclusion that Arkansas' notice methods satisfy due process is reinforced by the well-established presumption that individuals, especially those owning property, act in their own interest. Recognizing that " '[i]t is the part of common prudence for all those who have any interest in [a thing], to guard that interest by persons who are in a situation to protect it,' " *Mullane, supra,* at 316 (quoting *The Mary,* 9 Cranch 126, 144 (1815)), this Court has concluded that "[t]he ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights," *Mullane,* 339 U. S., at 316. Consistent with this observation, Arkansas was free to "indulge the assumption" that petitioner had either provided the state taxing authority with a correct and up-to-date mailing address—as required by state law—"or that he . . . left some caretaker under a duty to let him know that [his property was] being jeopardized."[3] *Ibid.*

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[2] The Court found inadequate the State's attempt at notice by publication, as if that were the State's *sole* method for effectuating notice, see *ante,* at 237. But the State plainly used it here as a *secondary* method of notice.

The Court does not conclude that certified mail is inherently insufficient as a means of notice, but rather that "the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice." *Ante,* at 230. I disagree.

First, whether a method of notice is reasonably calculated to notify the interested party is determined *ex ante, i. e.,* from the viewpoint of the government agency at the time its notice is sent. This follows from *Mullane,* where this Court rested its analysis on the information the sender had "at hand" when its notice was sent. 339 U. S., at 318. Relatedly, we have refused to evaluate the reasonableness of a particular method of notice by comparing it to alternative methods that are identified after the fact. See *Dusenbery,* 534 U. S., at 171–172. Today the Court appears to abandon both of these practices. Its rejection of Arkansas' selected method of notice—a method this Court has repeatedly concluded is constitutionally sufficient—is based upon information that was unavailable when notice was sent. Indeed, the Court's proposed notice methods—regular mail, posting, and addressing mail to "'occupant,'" *ante,* at 234–235—are entirely the product of *post hoc* considerations, including the discovery that members of petitioner's family continued to live in the house. Similarly, the Court's observation that "[t]he Commissioner['s] complain[t] about the burden of . . . additional steps . . . is belied by Arkansas' current requirement that notice to homestead owners be accomplished by personal service if certified mail is returned," *ante,* at

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[3] The issue is not, as the Court maintains, whether the current occupant is "charged with acting as the owner's agent." *Ante,* at 233. Rather, the issue is whether petitioner discharged his *own* duty to guard his interests.

236, is contrary to *Dusenbery's* "conclusion that the Government ought not be penalized and told to 'try harder' . . . simply because [it] has since upgraded its policies," 534 U. S., at 172.

Second, implicit in our holding that due process does not require "actual notice," see *id.*, at 169–170, is that when the "government becomes aware . . . that its attempt at notice has failed," *ante*, at 227, it is not required to take additional steps to ensure that notice has been received. Petitioner's challenge to Arkansas' notice methods, and the Court's acceptance of it, is little more than a thinly veiled attack on *Dusenbery*. Under the majority's logic, each time a doubt is raised with respect to whether notice has reached an interested party, the State will have to consider additional means better calculated to achieve notice. Because this rule turns on speculative, newly acquired information, it has no natural end point, and, in effect, requires the States to achieve something close to actual notice. The majority's new rule is contrary to *Dusenbery* and a significant departure from *Mullane*.

The only circumstances in which this Court has found notice by mail and publication inadequate under the Due Process Clause involve situations where the state or local government knew at the outset that its notice efforts were destined to fail and knew how to rectify the problem prior to sending notice. See *Robinson* v. *Hanrahan*, 409 U. S. 38, 39 (1972) *(per curiam)* (intended recipient known to be in jail); *Covey* v. *Town of Somers*, 351 U. S. 141, 145 (1956) (intended recipient known to be incompetent and without a guardian).

In *Robinson*, the State, having arrested petitioner and having detained him in county jail, immediately instituted forfeiture proceedings against his automobile and mailed notice of those proceedings to his residential address. 409 U. S., at 38. Robinson, who was incarcerated in the county jail during the entirety of the forfeiture proceedings, did not receive notice of the proceedings until after he was released and the forfeiture order had been entered. *Id.*, at 38–39. Because the State knew beforehand that Robinson was not at, and had no access to, the address to which it sent the notice, this Court held that the State's efforts were not " 'reasonably calculated' " to notify him of the pending proceedings. *Id.*, at 40. Similarly, in *Covey*, the Court concluded that the methods of notice used by the town—mailing, posting, and publishing—were not reasonably calculated to inform Covey of proceedings adverse to her property interests because local officials knew prior to sending notice that she was "without mental capacity to handle her affairs" and unable to comprehend the meaning of the notices. 351 U. S., at 144, 146.

By contrast, Arkansas did not know at the time it sent notice to petitioner that its method would fail, and Arkansas did not know that petitioner no longer lived at the record address simply because letters were returned "unclaimed." Pet. for Cert. 3. "[U]nclaimed" does not necessarily mean that an address is no longer correct; it may indicate that an intended recipient has simply failed or refused to claim mail. See United States Postal Service, Domestic Mail Manual (DMM), §507, Exh. 1.4.1, http://pe.usps.gov/text/dmm300/507.htm.[4] Given that the State had been using the address provided by petitioner and that petitioner had a legal duty to maintain a current mailing address with the state taxing authority, return of the mail as "unclaimed" did not arm Arkansas with the type of specific knowledge that the governments had at hand in *Robinson* and *Covey*. Cf. *ante*, at 234. The State cannot be charged to correct a problem of petitioner's own creation and of which it was not aware.[5] Even if the State had divined that petitioner was no longer at the record address, its publication of notice in a local newspaper would have sufficed because *Mullane* authorizes the use of publication when the record address is unknown. See 339 U. S., at 316 ("[P]ublication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning").

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[4] The Postal Service uses "Moved, Left No Address" to indicate that the "[a]ddressee moved and filed no change-of-address order," and "Not Deliverable as Addressed—Unable to Forward" to indicate that the mail is "undeliverable at address given; no change-of-address order on file; forwarding order expired." DMM §507, Exh. 1.4.1.

## II

The Court's proposed methods, aside from being constitutionally unnecessary, are also burdensome, impractical, and no more likely to effect notice than the methods actually employed by the State.

In Arkansas, approximately 18,000 parcels of delinquent real estate are certified annually. *Tsann Kuen Enterprises Co.* v. *Campbell*, 355 Ark. 110, 119–120, 129 S. W. 3d 822, 828 (2003). Under the Court's rule, the State will bear the burden of locating thousands of delinquent property owners. These administrative burdens are not compelled by the Due Process Clause. See *Mullane, supra*, at 313–314; *Tulsa Professional Collection Services, Inc.*, 485 U. S., at 489–490 (stating that constitutionally sufficient notice "need not be inefficient or burdensome"). Here, Arkansas has determined that its law requiring property owners to maintain a current address with the state taxing authority, in conjunction with its authorization to send property notices to the record address, is an efficient and fair way to administer its tax collection system. The Court's decision today forecloses such a reasonable system and burdens the State with inefficiencies caused by delinquent taxpayers.

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[5] The Court's "storm drain" hypothetical, *ante*, at 229, presents the harder question of when notice is sent—at the precise moment the Commissioner places the mail in the postal carrier's hand or the split second later when he observes the departing carrier drop the mail down the storm drain. That more difficult question is not before us in this case because Arkansas learned long after the fact that its attempts had been unsuccessful.

Moreover, the Court's proposed methods are no more reasonably calculated to achieve notice than the methods employed by the State here. Regular mail is hardly foolproof; indeed, it is arguably less effective than certified mail. Certified mail is tracked, delivery attempts are recorded, actual delivery is logged, and notices are posted to alert someone at the residence that certified mail is being held at a local post office. By creating a record, these features give parties grounds for defending or challenging notice. By contrast, regular mail is untraceable; there is no record of either delivery or receipt. Had the State used regular mail, petitioner would presumably argue that it should have sent notice by certified mail because it creates a paper trail.[6]

The Court itself recognizes the deficiencies of its proposed methods. It acknowledges that "[f]ollowing up with regular mail *might* . . . increase the chances of actual notice"; "occupants who ignored certified mail notice slips . . . *might* scrawl the owner's new address on the notice packet," *ante*, at 235 (emphasis added); and "a letter addressed to [occupant] *might* be opened and read," *ibid.* (emphasis added). Nevertheless, the Court justifies its redrafting of Arkansas' notice statute on the ground that "[its] approach[es] would increase the likelihood that the owner would be notified that he was about to lose his property . . . ." *Ibid.* That, however, is not the test; indeed, we rejected such reasoning in *Dusenbery.* See 534 U. S., at 171 (rejecting the argument that "the FBI's notice was constitutionally flawed because it was 'substantially less likely to bring home notice' than a feasible substitute" (some internal quotation marks omitted)).

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[6] Interestingly, the Court stops short of saddling the State with the other steps that petitioner argues a State should take any time the interested party fails to claim letters mailed to his record address, see *ante*, at 235–236, namely, searching state tax records, the phonebook, the Internet, department of motor vehicle records, or voting rolls, contacting his employer, or employing debt collectors. Here, the Court reasons that because of the context—the fact that the letter was returned merely "unclaimed" and petitioner had a duty to maintain a current address—the State is not required to go as far as petitioner urges. *Ante*, at 236. Though the methods proposed by petitioner are severely flawed (for instance, the commonality of his surname "Jones" calls into question the fruitfulness of Internet and phonebook searches), there is no principled basis for the Court's conclusion that petitioner's other proposed methods would "impos[e] burdens on the State significantly greater than the several relatively easy options outlined [by the Court]." *Ibid.*

The Court's suggestion that Arkansas post notice is similarly unavailing. The State's records are organized by legal description, not address, which makes the prospect of physically locating tens of thousands of properties every year, and posting notice on each, impractical. See *Tsann Kuen Enterprises Co., supra,* at 119–120, 129 S. W. 3d, at 828. Also, this Court has previously concluded that posting is an inherently unreliable method of notice. See *Greene* v. *Lindsey,* 456 U. S. 444, 453–454 (1982).

Similarly, addressing the mail to "'occupant,'" see *ante,* at 235, is no more reasonably calculated to reach petitioner. It is sheer speculation to assume, as the Court does, that although "[o]ccupants . . . might disregard a certified mail slip . . . , . . . a letter addressed to them (even as 'occupant') might be opened and read." *Ibid.* It is at least as likely that an occupant who receives generically addressed mail will discard it as junk mail.

## III

If "title to property should not depend on [factual] vagaries," *Dusenbery, supra,* at 171, then certainly it cannot turn on "wrinkle[s]," *ante,* at 227, caused by a property owner's own failure to be a prudent ward of his interests. The meaning of the Constitution should not turn on the antics of tax evaders and scofflaws. Nor is the self-created conundrum in which petitioner finds himself a legitimate ground for imposing additional constitutional obligations on the State. The State's attempts to notify petitioner by certified mail at the address that he provided and, additionally, by publishing notice in a local newspaper satisfy due process. Accordingly, I would affirm the judgment of the Arkansas Supreme Court.

# HARTMAN ET AL. *v.* MOORE

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04–1495. Argued January 10, 2006—Decided April 26, 2006

Seeking to convince the United States Postal Service to incorporate multiline optical scanning technology, a company (REI), which manufactured multiline optical readers, commenced an extensive lobbying and public-relations campaign. In the end, the Postal Service begrudgingly embraced the multiline technology, but awarded the lucrative equipment contract to a competing firm. Subsequently, Postal Service inspectors investigated REI and its chief executive, respondent Moore, for their alleged involvement in a consulting-firm kickback scandal and for their alleged improper role in the search for a new Postmaster General. Urged at least in part by the inspectors to bring criminal charges, a federal prosecutor tried REI and its top officials. But, finding a complete lack of evidence connecting them to any wrongdoing, the District Court acquitted the defendants. Moore then filed an action under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, against the federal prosecutor and petitioner postal inspectors, arguing, as relevant here, that they had engineered the prosecution in retaliation for his lobbying efforts. The claims against the prosecutor were dismissed in accordance with the absolute immunity for prosecutorial judgment. Ultimately, the entire suit was dismissed, but the Court of Appeals reinstated the retaliatory-prosecution claim against the inspectors. Back in District Court, the inspectors moved for summary judgment, claiming that because the underlying criminal charges were supported by probable cause they were entitled to qualified immunity. The District Court denied the motion, and the Court of Appeals affirmed.

*Held:* A plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges. Pp. 256–266.

(a) As a general matter, this Court has held that the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out. *Crawford-El* v. *Britton*, 523 U. S. 574, 592. When nonretaliatory grounds are insufficient to provoke the adverse consequences, retaliation is subject to recovery as the but-for cause of official injurious action offending the Constitution, see, *e. g., id.*, at 593, and a vengeful federal officer is subject to damages under *Bivens*. P. 256.

(b) Although a *Bivens* (or 42 U. S. C. § 1983) plaintiff must show a causal connection between a defendant's retaliatory animus and subsequent injury in any retaliation action, the need to demonstrate causation in the retaliatory-prosecution context presents an additional difficulty which can be overcome by a showing of the absence of probable cause. In an ordinary retaliation case, the evidence of motive and injury are sufficient for a circumstantial demonstration that the one caused the other, and the causation is understood to be but-for causation, without which the adverse action would not have been taken. When the claimed retaliation is, however, a criminal charge, the action will differ in two ways. First, evidence showing whether there was probable cause for the criminal charge will be highly valuable circumstantial evidence to prove or disprove retaliatory causation. Demonstrating a lack of probable cause will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution, while establishing the existence of probable cause will suggest that the prosecution would have occurred even without a retaliatory motive. Second, since the defendant in a retaliatory-prosecution case will not be the prosecutor, who has immunity, but an official who allegedly influenced the prosecutorial decision, the causal connection required is not between the retaliatory animus of one person and that person's own injurious action, as it is in the ordinary retaliation case, but between the retaliatory animus of one person and the adverse action of another. Because evidence of an inspector's animus does not necessarily show that the inspector induced the prosecutor to act when he would not have pressed charges otherwise and because of the longstanding presumption of regularity accorded prosecutorial decisionmaking, a showing of the absence of probable cause is needed to bridge the gap between the nonprosecuting government agent's retaliatory motive and the prosecutor's injurious action and to rebut the presumption. Pp. 256–264.

(c) The significance of probable cause or the lack of it looms large, being a potential feature of every case, with obvious evidentiary value. Though not necessarily dispositive, the absence of probable cause along with a retaliatory motive on the part of the official urging prosecution are reasonable grounds to suspend the presumption of regularity behind the charging decision and enough for a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to go forward. P. 265.

388 F. 3d 871, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 266. ROBERTS, C. J., and ALITO, J., took no part in the consideration or decision of the case.

*Deputy Solicitor General Kneedler* argued the cause for petitioners. With him on the brief were *Solicitor General Clement, Assistant Attorney General Keisler, Dan Himmelfarb, Barbara L. Herwig, Matthew M. Collette, Stephanie R. Marcus*, and *Richard Montague.*

*Patrick F. McCartan* argued the cause for respondent. With him on the brief were *Paul Michael Pohl* and *Christian G. Vergonis.**

JUSTICE SOUTER delivered the opinion of the Court.

This is a *Bivens* action against criminal investigators for inducing prosecution in retaliation for speech. The question is whether the complaint states an actionable violation of the First Amendment without alleging an absence of probable cause to support the underlying criminal charge. We hold that want of probable cause must be alleged and proven.

## I

In the 1980's, respondent William G. Moore, Jr., was the chief executive of Recognition Equipment Inc. (REI), which manufactured a multiline optical character reader for interpreting multiple lines of text. Although REI had received some $50 million from the United States Postal Service to develop this technology for reading and sorting mail, the Postmaster General and other top officials of the Postal Service were urging mailers to use nine-digit zip codes (Zip + 4), which would provide enough routing information on one line of text to allow single-line scanning machines to sort mail automatically by reading just that line.

Besides Moore, who obviously stood to gain financially from the adoption of multiline technology, some Members of

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**Richard Ruda* and *James I. Crowley* filed a brief for the National League of Cities et al. as *amici curiae* urging reversal.

Congress and Government research officers had reservations about the Postal Service's Zip + 4 policy and its intended reliance on single-line readers. Critics maligned single-line scanning technology, objected to the foreign sources of single-line scanners, decried the burden of remembering the four extra numbers,[1] and echoed the conclusion reached by the United States Office of Technology Assessment, that use of the single-line scanners in preference to multiliners would cost the Postal Service $1 million a day in operational losses.

Moore built on this opposition to Zip + 4, by lobbying Members of Congress, testifying before congressional committees, and supporting a "Buy American" rider to the Postal Service's 1985 appropriations bill. Notwithstanding alleged requests by the Postmaster General to be quiet, REI followed its agenda by hiring a public-relations firm, Gnau and Associates, Inc. (GAI), which one of the Postal Service's governors, Peter Voss, had recommended.

The campaign succeeded, and in July 1985 the Postal Service made what it called a "mid-course correction" and embraced multiline technology. Brief for Respondent 4. But the change of heart did not extend to Moore and REI, for the Service's ensuing order of multiline equipment, valued somewhere between $250 million and $400 million, went to a competing firm.

Not only did REI lose out on the contract, but Moore and REI were soon entangled in two investigations by Postal Service inspectors. The first looked into the purported payment of kickbacks by GAI to Governor Voss for Voss's recommendations of GAI's services, as in the case of REI; the second sought to document REI's possibly improper role in the search for a new Postmaster General. Notwithstanding very limited evidence linking Moore and REI to any wrongdoing, an Assistant United States Attorney decided to bring criminal charges against them, and in 1988 the grand jury indicted Moore, REI, and REI's vice president. At the close of the Government's case, after six weeks of trial, however, the District Court concluded that there was a "complete lack of direct evidence" connecting the defendants to any of the criminal wrongdoing alleged, and it granted the REI defendants' motion for judgment of acquittal. *United States* v. *Recognition Equip. Inc.*, 725 F. Supp. 587, 596 (DC 1989).

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[1] See, *e. g.*, Seaberry, Durenberger Begins Campaign Against Nine-Digit Zip Code, Washington Post, Feb. 24, 1981, p. E4 (describing Senator David Durenberger's reference to the Zip + 4 campaign as "'a mnemonic plague of contagious digititous'").

Moore then brought an action in the Northern District of Texas for civil liability under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971),[2] against the prosecutor and the five postal inspectors who are petitioners here (a sixth having died). His complaint raised five causes of action, only one of which is relevant here, the claim that the prosecutor and the inspectors had engineered his criminal prosecution in retaliation for criticism of the Postal Service, thus violating the First Amendment. In the course of these proceedings Moore has argued, among other things, that the postal inspectors launched a criminal investigation against him well before they had any inkling of either of the two schemes mentioned above, that the inspectors targeted him for his lobbying activities, and that they pressured the United States Attorney's Office to have him indicted. Moore also sought recovery from the United States under the Federal Tort Claims Act (FTCA). The District Court dismissed the claims against the Assistant United States Attorney in accordance with the absolute immunity for prosecutorial judgment, and rejected an abuse-of-process claim against the inspectors. *Moore* v. *Valder*, Civil Action No. 3:91–CV–2491–G (ND Tex., Sept. 21, 1992).[3]

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[2] "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson* v. *Green*, 446 U. S. 14, 18 (1980). Though more limited in some respects not relevant here, a *Bivens* action is the federal analog to suits brought against state officials under Rev. Stat. § 1979, 42 U. S. C. § 1983. See *Wilson* v. *Layne*, 526 U. S. 603, 609 (1999); see also Waxman & Morrison, What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause, 112 Yale L. J. 2195, 2208 (2003) ("Section 1983 applies . . . to state and local officers, [and] the Supreme Court in *Bivens* . . . inferred a parallel damages action against federal officers").

The claims remaining were transferred to the District Court for the District of Columbia, where Moore's suit was dismissed in its entirety, Civ. Nos. 92–2288 (NHJ), 93–0324 (NHJ), 1993 WL 405785 (Sept. 24, 1993), only to have the Court of Appeals for the District of Columbia Circuit reinstate the retaliatory-prosecution claim. *Moore* v. *Valder*, 65 F. 3d 189 (1995). The District Court then permitted limited discovery on that matter so far as the inspectors were involved, but again dismissed the remaining charges against the United States and the prosecutor. *Moore* v. *Valder*, Civil Action No. 92–2288 (NHJ) et al., Record, Tab No. 32 (Memorandum Opinion, Feb. 5, 1998). Although Moore succeeded in having the District of Columbia Circuit reinstate his FTCA claim against the United States, the dismissal of his claims against the prosecutor was affirmed. *Moore* v. *United States*, 213 F. 3d 705 (2000).

With the remainder of the case back in District Court, the inspectors moved for summary judgment, urging that because the underlying criminal charges were supported by probable cause they were entitled to qualified immunity from a retaliatory-prosecution suit. The District Court denied the motion, and the Court of Appeals affirmed. 388 F. 3d 871 (2004).

The Courts of Appeals have divided on the issue of requiring evidence of a lack of probable cause in 42 U. S. C. § 1983 and *Bivens* retaliatory-prosecution suits. Some Circuits burden plaintiffs with the obligation to show its absence. See, *e. g.*, *Wood* v. *Kesler*, 323 F. 3d 872, 883 (CA11 2003); *Keenan* v. *Tejeda*, 290 F. 3d 252, 260 (CA5 2002); *Mozzochi*

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[3] Moore and his wife had originally filed this complaint jointly. Her claims were dismissed for lack of standing.

v. *Borden*, 959 F. 2d 1174, 1179–1180 (CA2 1992). Others, including the District of Columbia Circuit, impose no such requirement. See, *e. g.*, *Poole* v. *County of Otero*, 271 F. 3d 955, 961 (CA10 2001); *Haynesworth* v. *Miller*, 820 F. 2d 1245, 1256–1257 (CADC 1987). We granted certiorari, 545 U. S. 1138 (2005), to resolve the Circuit split and now reverse.

## II

Official reprisal for protected speech "offends the Constitution [because] it threatens to inhibit exercise of the protected right," *Crawford-El* v. *Britton*, 523 U. S. 574, 588, n. 10 (1998), and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out, *id.*, at 592; see also *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972) (noting that the government may not punish a person or deprive him of a benefit on the basis of his "constitutionally protected speech"). Some official actions adverse to such a speaker might well be unexceptionable if taken on other grounds, but when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is subject to recovery as the but-for cause of official action offending the Constitution. See *Crawford-El, supra,* at 593; *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 283–284 (1977) (adverse action against government employee cannot be taken if it is in response to the employee's "exercise of constitutionally protected First Amendment freedoms"). When the vengeful officer is federal, he is subject to an action for damages on the authority of *Bivens*. See 403 U. S., at 397.

## III

Despite a procedural history portending another *Jarndyce* v. *Jarndyce*,[4] the issue before us is straightforward: whether a plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges.[5]

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[4] See 2 C. Dickens, Bleak House 85 (1853).

## A

The inspectors argue on two fronts that absence of probable cause should be an essential element. Without such a requirement, they first say, the *Bivens* claim is too readily available. A plaintiff can afflict a public officer with disruption and expense by alleging nothing more, in practical terms, than action with a retaliatory animus, a subjective condition too easy to claim and too hard to defend against. Brief for Petitioners 21–23; see also *National Archives and Records Admin.* v. *Favish*, 541 U. S. 157, 175 (2004) (allegations of government misconduct are " 'easy to allege and hard to disprove' "). In the inspectors' view, some "objective" burden must be imposed on these plaintiffs, simply to filter out the frivolous. The second argument complements the first, for the inspectors believe that the traditional tort of malicious prosecution tells us what the objective requirement should be. Brief for Petitioners 24–29. In an action for malicious prosecution after an acquittal, a plaintiff must show that the criminal action was begun without probable cause for charging the crime in the first place; the inspectors see retaliatory prosecution under *Bivens* as a close cousin of malicious prosecution under common law, making the latter's no-probable-cause requirement a natural feature of the constitutional tort. See *Heck* v. *Humphrey*, 512 U. S. 477, 483–485, and 484, n. 4 (1994).

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[5] Moore contends that we (like the Court of Appeals before us) exceed our appellate jurisdiction when we address the issue of probable cause, see Brief for Respondent 37–39, but his argument is mistaken. It is true that the disagreement over a no-probable-cause requirement arose on the inspectors' motion for summary judgment on their qualified-immunity defense; Moore stresses that an interlocutory appeal can be taken from the rejection of qualified immunity at the summary-judgment stage only on questions turning on the definition of the violation, not on the sufficiency of the evidence to show that a defendant is in fact entitled to the immunity claimed. See *Mitchell* v. *Forsyth*, 472 U. S. 511, 528 (1985). Moore says that the issue of probable cause or its absence is simply an evidentiary matter going to entitlement in fact. But the inspectors are making more than a claim about the evidence in this case: they are arguing that we should hold that a showing of no probable cause is an element of the kind of claim Moore is making against them. In agreeing with the inspectors, we are addressing a requirement of causation, which Moore must plead and prove in order to win, and our holding does not go beyond a definition of an element of the tort, directly implicated by the defense of qualified immunity and properly before us on interlocutory appeal. See *ibid.*; see also *Crawford-El* v. *Britton*, 523 U. S. 574, 588, 592–593 (1998); *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 285–286 (1977).

## B

In fact, we think there is a fair argument for what the inspectors call an "objective" fact requirement in this type of case, but the nub of that argument differs from the two they set out, which we will deal with only briefly. As for the invitation to rely on common-law parallels, we certainly are ready to look at the elements of common-law torts when we think about elements of actions for constitutional violations, see *Carey* v. *Piphus*, 435 U. S. 247, 258 (1978), but the common law is best understood here more as a source of inspired examples than of prefabricated components of *Bivens* torts. See, *e. g.*, *Albright* v. *Oliver*, 510 U. S. 266, 277, n. 1 (1994) (GINSBURG, J., concurring); *Bivens*, *supra*, at 394; cf. *Baker* v. *McCollan*, 443 U. S. 137, 146 (1979). And in this instance we could debate whether the closer common-law analog to retaliatory prosecution is malicious prosecution (with its no-probable-cause element) or abuse of process (without it). Compare *Heck*, 512 U. S., at 483–485, and 484, n. 4, with *id.*, at 493–496 (SOUTER, J., concurring in judgment).

Nor is there much leverage in the fear that without a filter to screen out claims federal prosecutors and federal courts will be unduly put upon by the volume of litigation. The basic concern is fair enough, but the slate is not blank. Over the past 25 years fewer than two dozen damages actions for retaliatory prosecution under *Bivens* or § 1983 have come squarely before the Federal Courts of Appeals, and there is no disproportion of those cases in Circuits that do not require showing an absence of probable cause.[6]

### C

It is, instead, the need to prove a chain of causation from animus to injury, with details specific to retaliatory-prosecution cases, that provides the strongest justification for the no-probable-cause requirement espoused by the inspectors. Although a *Bivens* (or § 1983) plaintiff must show a causal connection between a defendant's retaliatory animus and subsequent injury in any sort of retaliation action, see *Crawford-El*, 523 U. S., at 593; *Mt. Healthy*, 429 U. S., at 285–287, the need to demonstrate causation in the retaliatory-prosecution context presents an additional difficulty that can be understood by comparing the requisite causation in ordinary retaliation claims, where the government agent allegedly harboring the animus is also the individual allegedly taking the adverse action, with causation in a case like this one.

Take the example of a public employee's claim that he was fired for speech criticizing the government. See, *e. g.*, *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 566–567 (1968) (allegation that a school board dismissed a teacher for writing a public letter critical of the board's financial administration). While the employee plaintiff obviously must plead and prove adverse official action in retaliation for making the statements, our discussions of the elements of the constitutional tort do not specify any necessary details about proof of a connection between the retaliatory animus and the discharge, which will depend on the circumstances. Cf. *Crawford-El, supra,* at 593 ("[A]t least with certain types of claims, proof of an improper motive is not sufficient to establish a constitutional violation—there must also be evidence of causation"). The cases have simply taken the evidence of the motive and the discharge as sufficient for a circumstantial demonstration that the one caused the other. See, *e. g., Mt. Healthy, supra,* at 287; see also *Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U. S. 252, 270, n. 21 (1977). It is clear, moreover, that the causation is understood to be but-for causation, without which the adverse action would not have been taken; we say that upon a prima facie showing of retaliatory harm, the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of (such as firing the employee). See *Mt. Healthy,* 429 U. S., at 287. If there is a finding that retaliation was not the but-for cause of the discharge, the claim fails for lack of causal connection between unconstitutional motive and resulting harm, despite proof of some retaliatory animus in the official's mind. See *ibid.* It may be dishonorable to act with an unconstitutional motive and perhaps in some instances be unlawful, but action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway. See *Crawford-El, supra,* at 593; *Mt. Healthy, supra,* at 285–286.

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[6] In fact, many of the appellate challenges have been brought in the Second, Fifth, and Eleventh Circuits, all of which require plaintiffs to show an absence of probable cause. See, *e. g.*, *Izen* v. *Catalina*, 398 F. 3d 363 (CA5 2005) *(per curiam)*; *Wood* v. *Kesler*, 323 F. 3d 872 (CA11 2003); *Keenan* v. *Tejeda*, 290 F. 3d 252 (CA5 2002); *Singer* v. *Fulton County Sheriff*, 63 F. 3d 110 (CA2 1995); *Post* v. *Fort Lauderdale*, 7 F. 3d 1552 (CA11 1993); *Mozzochi* v. *Borden*, 959 F. 2d 1174 (CA2 1992); *Magnotti* v. *Kuntz*, 918 F. 2d 364 (CA2 1990).

When the claimed retaliation for protected conduct is a criminal charge, however, a constitutional tort action will differ from this standard case in two ways. Like any other plaintiff charging official retaliatory action, the plaintiff in a retaliatory-prosecution claim must prove the elements of retaliatory animus as the cause of injury, and the defendant will have the same opportunity to respond to a prima facie case by showing that the action would have been taken anyway, independently of any retaliatory animus. What is different about a prosecution case, however, is that there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge. Demonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution, while establishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive. This alone does not mean, of course, that a *Bivens* or § 1983 plaintiff should be required to plead and prove no probable cause, but it does mean that litigating probable cause will be highly likely in any retaliatory-prosecution case, owing to its powerful evidentiary significance.[7]

The second respect in which a retaliatory-prosecution case is different also goes to the causation that a *Bivens* plaintiff must prove; the difference is that the requisite causation between the defendant's retaliatory animus and the plaintiff's injury is usually more complex than it is in other retaliation cases, and the need to show this more complex connection supports a requirement that no probable cause be alleged and proven. A *Bivens* (or § 1983) action for retaliatory prosecution will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute, *Imbler* v. *Pachtman,* 424 U. S. 409, 431 (1976).[8] Instead, the defendant will be a nonprosecutor, an official, like an inspector here, who may have influenced the prosecutorial decision but did not himself make it, and the cause of action will not be strictly for retaliatory prosecution, but for successful retaliatory inducement to prosecute.[9] The consequence is that a plaintiff like Moore must show that the nonprosecuting official acted in retaliation, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging.

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[7] Indeed, even though the Court of Appeals in this case held that plaintiffs do not have to show an absence of probable cause in order to make retaliatory-prosecution claims, it nevertheless acknowledged probable cause's significance in such suits. See 388 F. 3d 871, 881 (CADC 2004) ("Given that probable cause ordinarily suffices to initiate a prosecution, that showing will be enough in most cases to establish that prosecution would have occurred absent bad intent. A *Bivens* recovery remains possible, however, in those rare cases where strong motive evidence combines with weak probable cause to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus").

Thus, the causal connection required here is not merely between the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person and the action of another. See 213 F. 3d, at 710 ("In order to find that a defendant procured a prosecution, the plaintiff must establish 'a chain of causation' linking the defendant's actions with the initiation of criminal proceedings"); see also *Barts* v. *Joyner,* 865 F. 2d 1187, 1195 (CA11 1989) (plaintiff seeking damages incident to her criminal prosecution would have to show that the police, who allegedly acted in violation of law in securing her arrest, unduly pressured or deceived prosecutors); *Dellums* v. *Powell*, 566 F. 2d 167, 192–193 (CADC 1977) (where allegation of misconduct is directed at police, a malicious-prosecution claim cannot stand if the decision made by the prosecutor to bring criminal charges was independent of any pressure exerted by police); cf. *Smiddy* v. *Varney*, 665 F. 2d 261, 267 (CA9 1981) ("[W]here police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the arrested person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted").

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[8] An action could still be brought against a prosecutor for conduct taken in an investigatory capacity, to which absolute immunity does not extend. See *Buckley* v. *Fitzsimmons,* 509 U. S. 259, 274–276 (1993) (no absolute immunity when prosecutor acts in administrative capacity); *Burns* v. *Reed,* 500 U. S. 478, 492–495 (1991) (absolute immunity does not attach when a prosecutor offers legal advice to the police regarding interrogation practices). In fact, Moore's complaint charged the prosecutor with acting in an investigative as well as in a prosecutorial capacity, see App. 45, but dismissal of the complaint as against the prosecutor was affirmed in 213 F. 3d 705, 710 (CADC 2000), and no claim against him is before us now.

[9] No one here claims that simply conducting a retaliatory investigation with a view to promote a prosecution is a constitutional tort. That is not part of Moore's complaint. See App. 33–34, 38–45. Whether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional violation is not before us.

Herein lies the distinct problem of causation in cases like this one. Evidence of an inspector's animus does not necessarily show that the inspector induced the action of a prosecutor who would not have pressed charges otherwise. Moreover, to the factual difficulty of divining the influence of an investigator or other law enforcement officer upon the prosecutor's mind, there is an added legal obstacle in the longstanding presumption of regularity accorded to prosecutorial decisionmaking. See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 489–490 (1999); *United States* v. *Armstrong*, 517 U. S. 456, 464–466 (1996). And this presumption that a prosecutor has legitimate grounds for the action he takes is one we do not lightly discard, given our position that judicial intrusion into executive discretion of such high order should be minimal, see *Wayte* v. *United States*, 470 U. S. 598, 607–608 (1985).

Some sort of allegation, then, is needed both to bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action, and to address the presumption of prosecutorial regularity. And at the trial stage, some evidence must link the allegedly retaliatory official to a prosecutor whose action has injured the plaintiff. The connection, to be alleged and shown, is the absence of probable cause.

It would be open to us, of course, to give no special prominence to an absence of probable cause in bridging the causal gap, and to address this distinct causation concern at a merely general level, leaving it to such pleading and proof as the circumstances allow. A prosecutor's disclosure of retaliatory thinking on his part, for example, would be of great significance in addressing the presumption and closing the gap. So would evidence that a prosecutor was nothing but a rubber stamp for his investigative staff or the police. Cf. *Mt. Healthy*, 429 U. S., at 281–283 (evidence that the board of education, which formally decided not to rehire a teacher, was only nominally distinct from the school superintendent, who allegedly bore the retaliatory animus). In fact, though, these examples are likely to be rare and consequently poor guides in structuring a cause of action. In most cases, for instance, it would be unrealistic to expect a prosecutor to reveal his mind even to the degree that this record discloses, with its reported statement by the prosecutor that he was not galvanized by the merits of the case, but sought the indictment against Moore because he wanted to attract the interest of a law firm looking for a tough trial lawyer.[10]

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[10] Some may suggest that we should structure a cause of action in the alternative, dispensing with a requirement to show no probable cause when a plaintiff has evidence of a direct admission by a prosecutor that, irrespective of probable cause, the prosecutor's sole purpose in initiating a criminal prosecution was to acquiesce to the inducements of other government agents, who themselves harbored retaliatory animus. Cf. *United States* v. *Armstrong*, 517 U. S. 456, 469, n. 3 (1996) (leaving open the question "whether a [criminal] defendant must satisfy the similarly situated requirement in a case 'involving direct admissions by [prosecutors] of discriminatory purpose'" (brackets in original)). But this would seem a little like proposing that retirement plans include the possibility of winning the lottery. Unambiguous admissions of successful inducement are likely to be rare, and hassles over the adequacy of admissions will be the predictable result, if any exemption to a no-probable-cause requirement is allowed.

Accordingly, the significance of probable cause or the lack of it looms large, being a potential feature of every case, with obvious evidentiary value. True, it is not necessarily dispositive: showing an absence of probable cause may not be conclusive that the inducement succeeded, and showing its presence does not guarantee that inducement was not the but-for fact in a prosecutor's decision. But a retaliatory motive on the part of an official urging prosecution combined with an absence of probable cause supporting the prosecutor's decision to go forward are reasonable grounds to suspend the presumption of regularity behind the charging decision, see *Bordenkircher* v. *Hayes*, 434 U. S. 357, 364 (1978) (emphasizing that "so long as the prosecutor has probable cause," the charging decision is generally discretionary), and enough for a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to bring the charge.

Our sense is that the very significance of probable cause means that a requirement to plead and prove its absence will usually be cost free by any incremental reckoning. The issue is so likely to be raised by some party at some point that treating it as important enough to be an element will be a way to address the issue of causation without adding to time or expense. See n. 7, *supra*. In this case, for example, Moore cannot succeed in the retaliation claim without showing that the Assistant United States Attorney was worse than just an unabashed careerist, and if he can show that the prosecutor had no probable cause, the claim of retaliation will have some vitality.

In sum, the complexity of causation in a claim that prosecution was induced by an official bent on retaliation should be addressed specifically in defining the elements of the tort. Probable cause or its absence will be at least an evidentiary issue in practically all such cases. Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

THE CHIEF JUSTICE and JUSTICE ALITO took no part in the consideration or decision of this case.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

The Court of Appeals, reviewing the record so far made, determined that "[t]he evidence of retaliatory motive [came] close to the proverbial smoking gun." 388 F. 3d 871, 884 (CADC 2004). The record also indicated that the postal inspectors engaged in "unusual prodding," strenuously urging a reluctant U. S. Attorney's Office to press charges against Moore. *Ibid.* Following Circuit precedent, the Court of Appeals held that "once a plaintiff shows [conduct sheltered by the First Amendment] to have been a motivating factor in the decision to press charges," the burden shifts to the defending officials to show that the case would have been pursued anyway. *Id.*, at 878.

Recognizing that this case is now directed against the instigating postal inspectors alone, not the prosecutor, I would not assign to the plaintiff the burden of pleading and proving the absence of probable cause for the prosecution. Instead, in agreement with the Court of Appeals, I would assign to the postal inspectors who urged the prosecution the burden of showing that, had there been no retaliatory motive and importuning, the U. S. Attorney's Office nonetheless would have pursued the case.

Under the Court's proof burden allocation, which saddles plaintiff—the alleged victim—with the burden to plead and prove lack of probable cause, only *entirely* "baseless prosecutions" would be checked. *Id.*, at 879. So long as the retaliators present evidence barely sufficient to establish probable cause and persuade a prosecutor to act on their thin information, they could accomplish their mission cost free. Their victim, on the other hand, would incur not only the costs entailed in mounting a defense, he likely would sustain a reputational loss as well, and neither loss would be compensable under federal law. Under the D. C. Circuit's more speech-protective formulation, "[a] *Bivens* [v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971),] recovery remains possible . . . in those rare cases where strong motive evidence combines with weak probable cause to support a finding that the [investigation and ensuing] prosecution would not have occurred but for the [defending] officials' retaliatory animus." *Id.*, at 881. That such situations "are likely to be rare," it seems to me, does not warrant "structuring a cause of action," *ante*, at 264, that precludes relief when they do arise.

For reasons fully developed in the D. C. Circuit's opinion, I conclude that, in full accord with this Court's decision in *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977), the Court of Appeals' decision strikes the proper balance. I would, therefore, affirm the Circuit's judgment.

# ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. *v.* AHLBORN

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 04–1506. Argued February 27, 2006—Decided May 1, 2006

Federal Medicaid law requires participating States to "ascertain the legal liability of third parties . . . to pay for [an individual benefits recipient's] care and services available under the [State's] plan," 42 U. S. C. § 1396a(a)(25)(A); to "seek reimbursement for [medical] assistance to the extent of such legal liability," § 1396a(a)(25)(B); to enact "laws under which, to the extent that payment has been made . . . for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services," § 1396a(a)(25)(H); to "provide that, as a condition of [Medicaid] eligibility . . . , the individual is required . . . (A) to assign the State any rights . . . to payment for medical care from any third party; . . . (B) to cooperate with the State . . . in obtaining [such] payments . . . and . . . (C) . . . in identifying, and providing information to assist the State in pursuing, any third party who may be liable," § 1396k(a)(1). Finally, "any amount collected by the State under an assignment made" as described above "shall be retained by the State . . . to reimburse it for [Medicaid] payments made on behalf of" the recipient. § 1396k(b). "[T]he remainder of such amount collected shall be paid" to the recipient. *Ibid.* Acting pursuant to its understanding of these provisions, Arkansas passed laws under which, when a state Medicaid recipient obtains a tort settlement following payment of medical costs on her behalf, a lien is automatically imposed on the settlement in an amount equal to Medicaid's costs. When that amount exceeds the portion of the settlement representing medical costs, satisfaction of the State's lien requires payment out of proceeds meant to compensate the recipient for damages distinct from medical costs, such as pain and suffering, lost wages, and loss of future earnings.

Following respondent Ahlborn's car accident with allegedly negligent third parties, petitioner Arkansas Department of Health and Human Services, then named Arkansas Department of Human Services (ADHS), determined that Ahlborn was eligible for Medicaid and paid providers $215,645.30 on her behalf. She filed a state-court suit against the alleged tortfeasors seeking damages for past medical costs and for other items including pain and suffering, loss of earnings and working time, and permanent impairment of her future earning ability. The case was settled out of court for $550,000, which was not allocated between categories of damages. ADHS did not participate or ask to participate in the settlement negotiations, and did not seek to reopen the judgment after the case was dismissed, but did intervene in the suit and assert a lien against the settlement proceeds for the full amount it had paid for Ahlborn's care. She filed this action in Federal District Court seeking a declaration that the State's lien violated federal law insofar as its satisfaction would require depletion of compensation for her injuries other than past medical expenses. The parties stipulated, *inter alia*, that the settlement amounted to approximately one-sixth of the reasonable value of Ahlborn's claim and that, if her construction of federal law was correct, ADHS would be entitled to only the portion of the settlement ($35,581.47) that constituted reimbursement for medical payments made. In granting ADHS summary judgment, the court held that under Arkansas law, which it concluded did not conflict with federal law, Ahlborn had assigned ADHS her right to recover the full amount of Medicaid's payments for her benefit. The Eighth Circuit reversed, holding that ADHS was entitled only to that portion of the settlement that represented payments for medical care.

*Held:* Federal Medicaid law does not authorize ADHS to assert a lien on Ahlborn's settlement in an amount exceeding $35,581.47, and the federal anti-lien provision affirmatively prohibits it from doing so. Arkansas' third-party liability provisions are unenforceable insofar as they compel a different conclusion. Pp. 280–292.

(a) Arkansas' statute finds no support in the federal third-party liability provisions. That ADHS cannot claim more than the portion of Ahlborn's settlement that represents medical expenses is suggested by § 1396k(a)(1)(A), which requires that Medicaid recipients, as a condition of eligibility, "assign the State any rights . . . *to payment for medical care* from any third party" (emphasis added), not their rights to payment for, *e. g.*, lost wages. The other statutory language ADHS relies on is not to the contrary, but reinforces the assignment provision's implicit limitation. First, statutory context shows that § 1396a(a)(25)(B)'s requirement that States "seek reimbursement for [medical] assistance *to the extent of such legal liability*" refers to "the legal liability of third parties . . . *to pay for care and services available under the plan*," § 1396a(a)(25)(A) (emphasis added). Here, because the tortfeasors accepted liability for only one-sixth of Ahlborn's overall damages, and ADHS has stipulated that only $35,581.47 of that sum represents compensation for medical expenses, the relevant "liability" extends no further than that amount. Second, § 1396a(a)(25)(H)'s requirement that the State enact laws giving it the right to recover from liable third parties "to the extent [it made] payment . . . for medical assistance for health care items or services furnished to an individual" does not limit the State's recovery only by the amount it paid out on the recipient's behalf, since the rest of the provision makes clear that the State must be assigned "the rights of [the recipient] to payment by any other party *for such health care items or services.*" (Emphasis added.) Finally, § 1396k(b)'s requirement that, where the State actively pursues recovery from the third party, Medicaid be reimbursed fully from "any amount collected by the State under an assignment" before "the remainder of such amount collected" is remitted to the recipient does not show that the State must be paid in full from any settlement. Rather, because the State's assigned rights extend only to recovery of medical payments, what § 1396k(b) requires is that the State be paid first out of any damages for medical care before the recipient can recover any of her own medical costs. Pp. 280–282.

(b) Arkansas' statute squarely conflicts with the federal Medicaid law's anti-lien provision, § 1396p(a)(1), which prohibits States from imposing liens "against the property of any individual prior to his death on account of medical assistance paid . . . on his behalf under the State plan." Even if the State's lien is assumed to be consistent with federal law insofar as it encumbers proceeds designated as medical payments, the anti-lien provision precludes attachment or encumbrance of the remainder of the settlement. ADHS' attempt to avoid the anti-lien provision by characterizing the settlement proceeds as not Ahlborn's "property," but as the State's, fails for two reasons. First, because the settlement is not "received from a third party," as required by the state statute, until Ahlborn's chose in action has been reduced to proceeds in her possession, the assertion that any of the proceeds belonged to the State all along lacks merit. Second, the State's argument that Ahlborn lost her property rights in the proceeds the instant she applied for medical assistance is inconsistent with the creation of a statutory lien on those proceeds: ADHS would not need a lien on its own property. Pp. 283–286.

(c) The Court rejects as unpersuasive ADHS' and the United States' arguments that a rule permitting a lien on more than medical damages ought to apply here either because Ahlborn breached her duty to "cooperate" with ADHS or because there is an inherent danger of manipulation in cases where the parties to a tort case settle without judicial oversight or input from the State. As § 1396k(a)(1)(C) demonstrates, the duty to cooperate arises principally, if not exclusively, in proceedings initiated *by the State* to recover from third parties. In any event, the aspersions cast upon Ahlborn are entirely unsupported; all the record reveals is that ADHS neither asked to be nor was involved in the settlement negotiations. Whatever the bounds of the duty to cooperate, there is no evidence that it was breached here. Although more colorable, the alternative argument that a rule of full reimbursement is needed generally to avoid the risk of settlement manipulation also fails. The risk that parties to a tort suit will allocate away the State's interest can be avoided either by obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision. Pp. 287–288.

(d) Also rejected is ADHS' contention that the Eighth Circuit accorded insufficient weight to two decisions by the Departmental Appeals Board (Board) of the federal Department of Health and Human Services (HHS) rejecting appeals by two States from denial of reimbursement for costs they paid on behalf of Medicaid recipients who had settled tort claims. Although HHS generally has broad regulatory authority in the Medicaid area, the Court declines to treat the Board's reasoning in those cases as controlling because they address a different question from the one posed here, make no mention of the anti-lien provision, and rest on a questionable construction of the federal third-party liability provisions. Pp. 289–292.

397 F. 3d 620, affirmed.

STEVENS, J., delivered the opinion for a unanimous Court.

*Lori Freno*, Assistant Attorney General of Arkansas, argued the cause for petitioners. With her on the briefs was *Mike Beebe*, Attorney General.

*Patricia A. Millett* argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Clement, Assistant Attorney General Keisler, Deputy Solicitor General Kneedler, William Kanter*, and *Anne Murphy*.

*H. David Blair* argued the cause for respondent. With him on the brief was *Phillip Farris*.*

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*A brief of *amici curiae* urging reversal was filed for the State of Washington et al. by *Rob McKenna*, Attorney General of Washington, *William L. Williams*, Senior Assistant Attorney General, and *Kimberly D. Frinell*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *David W. Márquez* of Alaska, *Terry God-*

JUSTICE STEVENS delivered the opinion of the Court.

When a Medicaid recipient in Arkansas obtains a tort settlement following payment of medical costs on her behalf by Medicaid, Arkansas law automatically imposes a lien on the settlement in an amount equal to Medicaid's costs. When that amount exceeds the portion of the settlement that represents medical costs, satisfaction of the State's lien requires payment out of proceeds meant to compensate the recipient for damages distinct from medical costs—like pain and suffering, lost wages, and loss of future earnings. The Court of Appeals for the Eighth Circuit held that this statutory lien contravened federal law and was therefore unenforceable. *Ahlborn* v. *Arkansas Dept. of Human Servs.*, 397 F. 3d 620 (2005). Other courts have upheld similar lien provisions. See, *e. g., Houghton* v. *Department of Health,* 2002 UT 101, 57 P. 3d 1067; *Wilson* v. *Washington,* 142 Wash. 2d 40, 10 P. 3d 1061 (2000) (en banc). We granted certiorari to resolve the conflict, 545 U. S. 1165 (2005), and now affirm.

## I

On January 2, 1996, respondent Heidi Ahlborn, then a 19-year-old college student and aspiring teacher, suffered se-

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*dard* of Arizona, *John W. Suthers* of Colorado, *Richard Blumenthal* of Connecticut, *Robert J. Spagnoletti* of the District of Columbia, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Phill Kline* of Kansas, *Gregory D. Stumbo* of Kentucky, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Michael A. Cox* of Michigan, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Kelly A. Ayotte* of New Hampshire, *Peter C. Harvey* of New Jersey, *Eliot Spitzer* of New York, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *Hardy Myers* of Oregon, *Patrick Lynch* of Rhode Island, *Henry McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Mark L. Shurtleff* of Utah, *Peggy A. Lautenschlager* of Wisconsin, and *Patrick J. Crank* of Wyoming.

*Louis M. Bograd, Ned Miltenberg,* and *Kenneth M. Suggs* filed a brief for the Association of Trial Lawyers of America as *amicus curiae* urging affirmance.

vere and permanent injuries as a result of a car accident. She was left brain damaged, unable to complete her college education, and incapable of pursuing her chosen career. Although she possessed a claim of uncertain value against the alleged tortfeasors who caused her injuries, Ahlborn's liquid assets were insufficient to pay for her medical care. Petitioner Arkansas Department of Health and Human Services (ADHS)[1] accordingly determined that she was eligible for medical assistance and paid providers $215,645.30 on her behalf under the State's Medicaid plan.

ADHS required Ahlborn to complete a questionnaire about her accident, and sent her attorney periodic letters advising him about Medicaid outlays. These letters noted that, under Arkansas law, ADHS had a claim to reimbursement from "any settlement, judgment, or award" obtained by Ahlborn from "a third party who may be liable for" her injuries, and that no settlement "shall be satisfied without first giving [ADHS] notice and a reasonable opportunity to establish its interest."[2] ADHS has never asserted, however, that Ahlborn has a duty to reimburse it out of any other subsequently acquired assets or earnings.

On April 11, 1997, Ahlborn filed suit against two alleged tortfeasors in Arkansas state court seeking compensation for the injuries she sustained in the January 1996 car accident. She claimed damages not only for past medical costs, but also for permanent physical injury; future medical expenses; past and future pain, suffering, and mental anguish; past loss of earnings and working time; and permanent impairment of the ability to earn in the future.

ADHS was neither named as a party nor formally notified of the suit. Ahlborn's counsel did, however, keep ADHS informed of details concerning insurance coverage as they became known during the litigation.

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[1] ADHS was then named Arkansas Department of Human Services.

[2] Affidavit of Wayne E. Olive, Exhs. 5 and 6 (Mar. 6, 2003).

In February 1998, ADHS intervened in Ahlborn's lawsuit to assert a lien on the proceeds of any third-party recovery Ahlborn might obtain. In October 1998, ADHS asked Ahlborn's counsel to notify the agency if there was a hearing in the case. No hearing apparently occurred, and the case was settled out of court sometime in 2002 for a total of $550,000. The parties did not allocate the settlement between categories of damages. ADHS did not participate or ask to participate in settlement negotiations. Nor did it seek to reopen the judgment after the case had been dismissed. ADHS did, however, assert a lien against the settlement proceeds in the amount of $215,645.30—the total cost of payments made by ADHS for Ahlborn's care.

On September 30, 2002, Ahlborn filed this action in the United States District Court for the Eastern District of Arkansas seeking a declaration that the lien violated the federal Medicaid laws insofar as its satisfaction would require depletion of compensation for injuries other than past medical expenses. To facilitate the District Court's resolution of the legal questions presented, the parties stipulated that Ahlborn's entire claim was reasonably valued at $3,040,708.12; that the settlement amounted to approximately one-sixth of that sum; and that, if Ahlborn's construction of federal law was correct, ADHS would be entitled to only the portion of the settlement ($35,581.47) that constituted reimbursement for medical payments made. See App. 17–20.

Ruling on cross-motions for summary judgment, the District Court held that under Arkansas law, which it concluded did not conflict with federal law, Ahlborn had assigned to ADHS her right to any recovery from the third-party tortfeasors to the full extent of Medicaid's payments for her benefit. Accordingly, ADHS was entitled to a lien in the amount of $215,645.30.

The Eighth Circuit reversed. It held that ADHS was entitled only to that portion of the judgment that represented payments for medical care. For the reasons that follow, we affirm.

## II

The crux of the parties' dispute lies in their competing constructions of the federal Medicaid laws. The Medicaid program, which provides joint federal and state funding of medical care for individuals who cannot afford to pay their own medical costs, was launched in 1965 with the enactment of Title XIX of the Social Security Act (SSA), as added, 79 Stat. 343, 42 U. S. C. § 1396 *et seq.* (2000 ed. and Supp. III). Its administration is entrusted to the Secretary of Health and Human Services (HHS), who in turn exercises his authority through the Centers for Medicare and Medicaid Services (CMS).[3]

States are not required to participate in Medicaid, but all of them do. The program is a cooperative one; the Federal Government pays between 50% and 83% of the costs the State incurs for patient care,[4] and, in return, the State pays its portion of the costs and complies with certain statutory requirements for making eligibility determinations, collecting and maintaining information, and administering the program. See § 1396a.

One such requirement is that the state agency in charge of Medicaid (here, ADHS) "take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the plan." § 1396a(a)(25)(A)

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[3] Until 2001, CMS was known as the Health Care Financing Administration or HCFA. See 66 Fed. Reg. 35437.

[4] The exact percentage of the federal contribution is calculated pursuant to a formula keyed to each State's per capita income. See 42 U. S. C. § 1396d(b).

(2000 ed.).[5] The agency's obligation extends beyond mere identification, however;

> "in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability." § 1396a(a)(25)(B).

To facilitate its reimbursement from liable third parties, the State must,

> "to the extent that payment has been made under the State plan for medical assistance in any case where a third party has a legal liability to make payment for such assistance, [have] in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services." § 1396a(a)(25)(H).

The obligation to enact assignment laws is reiterated in another provision of the SSA, which reads as follows:

> "(a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance under the State plan approved under this subchapter, a State plan for medical assistance shall—
>
> "(1) provide that, as a condition of eligibility for medical assistance under the State plan to an individual who

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[5] A "third party" is defined by regulation as "any individual, entity or program that is or may be liable to pay all or part of the expenditures for medical assistance furnished under a State plan." 42 CFR § 433.136 (2005).

> has the legal capacity to execute an assignment for himself, the individual is required—
>
> "(A) to assign the State any rights . . . to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party;
>
> "(B) to cooperate with the State . . . in obtaining support and payments (described in subparagraph (A)) for himself . . . ; and
>
> "(C) to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the plan . . . ." § 1396k(a).

Finally, "any amount collected by the State under an assignment made" as described above "shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of" the Medicaid recipient. § 1396k(b). "[T]he remainder of such amount collected shall be paid" to the recipient. *Ibid.*

Acting pursuant to its understanding of these third-party liability provisions, the State of Arkansas passed laws that purport to allow both ADHS and the Medicaid recipient, either independently or together, to recover "the cost of benefits" from third parties. Ark. Code Ann. §§ 20–77–301 through 20–77–309 (2001). Initially, "[a]s a condition of eligibility" for Medicaid, an applicant "shall automatically assign his or her right to any settlement, judgment, or award which may be obtained against any third party to [ADHS] to the full extent of any amount which may be paid by Medicaid for the benefit of the applicant." § 20–77–307(a). Accordingly, "[w]hen medical assistance benefits are provided" to the recipient "because of injury, disease, or disability for which another person is liable," ADHS "shall have a right to recover from the person the cost of benefits so provided." § 20–77–

301(a).[6] ADHS' suit "shall" not, however, "be a bar to any action upon the claim or cause of action of the recipient." § 20–77–301(b). Indeed, the statute envisions that the recipient will sometimes sue together with ADHS, see § 20–77–303, or even alone. If the latter, the assignment described in § 20–77–307(a) "shall be considered a statutory lien on any settlement, judgment, or award received . . . from a third party." § 20–77–307(c); see also § 20–77–302(a) ("When an action or claim is brought by a medical assistance recipient . . . , any settlement, judgment, or award obtained is subject to the division's claim for reimbursement of the benefits provided to the recipient under the medical assistance program").[7]

The State, through this statute, claims an entitlement to more than just that portion of a judgment or settlement that represents payment for medical expenses. It claims a right to recover the entirety of the costs it paid on the Medicaid recipient's behalf. Accordingly, if, for example, a recipient sues alone and settles her entire action against a third-party tortfeasor for $20,000, and ADHS has paid that amount or more to medical providers on her behalf, ADHS gets the whole settlement and the recipient is left with nothing. This is so even when the parties to the settlement allocate damages between medical costs, on the one hand, and other injuries like lost wages, on the other. The same rule also would apply, it seems, if the recovery were the result not of a settlement but of a jury verdict. In that case, under the Arkansas statute, ADHS could recover the full $20,000 in the face of a jury allocation of, say, only $10,000 for medical expenses.[8]

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[6] Under the Arkansas statute, ADHS' right to recover medical costs appears to be broader than that of the recipient. When ADHS sues, "no contributory or comparative fault of a recipient shall be attributed to the state, nor shall any restitution awarded to the state be denied or reduced by any amount or percentage of fault attributed to a recipient." § 20–77–301(d)(1) (2001).

[7] The Arkansas Supreme Court has held that ADHS has an independent, nonderivative right to recover the cost of benefits from a third-party tortfeasor under § 20–77–301 even when the Medicaid recipient also sues for recovery of medical expenses. See *National Bank of Commerce* v. *Quirk*, 323 Ark. 769, 792–794, 918 S. W. 2d 138, 151–152 (1996).

That this is what the Arkansas statute requires has been confirmed by the State's Supreme Court. In *Arkansas Dept. of Human Servs.* v. *Ferrel,* 336 Ark. 297, 984 S. W. 2d 807 (1999), the court refused to endorse an equitable, nontextual interpretation of the statute. Rejecting a Medicaid recipient's argument that he ought to retain some of a settlement that was insufficient to cover both his and Medicaid's expenses, the court explained:

> "Given the clear, unambiguous language of the statute, it is apparent that the legislature intended that ADHS's ability to recoup Medicaid payments from third parties or recipients not be restricted by equitable subrogation principles such as the 'made whole' rule stated in [*Franklin* v. *Healthsource of Arkansas,* 328 Ark. 163, 942 S. W. 2d 837 (1997)]. By creating an automatic legal assignment which expressly becomes a statutory lien, [Ark. Code Ann. § 20–77–307 (1991)] makes an unequivocal statement that the ADHS's ability to recover Medicaid payments from insurance settlements, if it so chooses, is superior to that of the recipient even when the settlement does not pay all the recipient's medical costs." *Id.*, at 308, 984 S. W. 2d, at 811.

Accordingly, the Arkansas statute, if enforceable against Ahlborn, authorizes imposition of a lien on her settlement proceeds in the amount of $215,645.30. Ahlborn's argument before the District Court, the Eighth Circuit, and this Court has been that Arkansas law goes too far. We agree. Arkansas' statute finds no support in the federal third-party liability provisions, and in fact squarely conflicts with the anti-lien provision of the federal Medicaid laws.

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[8] ADHS denies that it would actually demand the full $20,000 in such a case, see Brief for Petitioners 49, n. 13, but points to no provision of the Arkansas statute that would prevent it from doing so.

## III

We must decide whether ADHS can lay claim to more than the portion of Ahlborn's settlement that represents medical expenses.[9] The text of the federal third-party liability provisions suggests not; it focuses on recovery of payments for medical care. Medicaid recipients must, as a condition of eligibility, "assign the State any rights . . . *to payment for medical care* from any third party," 42 U. S. C. § 1396k(a)(1)(A) (emphasis added), not rights to payment for, for example, lost wages. The other statutory language that ADHS relies upon is not to the contrary; indeed, it reinforces the limitation implicit in the assignment provision.

First, ADHS points to § 1396a(a)(25)(B)'s requirement that States "seek reimbursement for [medical] assistance *to the extent of such legal liability*" (emphasis added) and suggests that this means that the entirety of a recipient's settlement is fair game. In fact, as is evident from the context of the emphasized language, "such legal liability" refers to "the legal liability of third parties . . . *to pay for care and services available under the plan.*" § 1396a(a)(25)(A) (emphasis added). Here, the tortfeasor has accepted liability for only one-sixth of the recipient's overall damages, and ADHS has stipulated that only $35,581.47 of that sum represents compensation for medical expenses. Under the circumstances, the relevant "liability" extends no further than that amount.[10]

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[9] The parties here assume, as do we, that a State can fulfill its obligations under the federal third-party liability provisions by requiring an "assignment" of part of, or placing a lien on, the settlement that a Medicaid recipient procures on her own. Cf. §§ 1396k(a)(1)(B)–(C) (the recipient has a duty to identify liable third parties and to "provid[e] information to *assist the State in pursuing*" those parties (emphasis added)).

Second, ADHS argues that the language of § 1396a(a)(25)(H) favors its view that it can demand full reimbursement of its costs from Ahlborn's settlement. That provision, which echoes the requirement of a mandatory assignment of rights in § 1396k(a), says that the State must have in effect laws that, "to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual," give the State the right to recover from liable third parties. This must mean, says ADHS, that the agency's recovery is limited only by the amount it paid out on the recipient's behalf—and not by the third-party tortfeasor's particular liability for medical expenses. But that reading ignores the rest of the provision, which makes clear that the State must be assigned "the rights of [the recipient] to payment by any other party *for such health care items or services.*" § 1396a(a)(25)(H) (emphasis added). Again, the statute does not sanction an assignment of rights to payment for anything other than medical expenses—not lost wages, not pain and suffering, not an inheritance.

Finally, ADHS points to the provision requiring that, where the State actively pursues recovery from the third party, Medicaid be reimbursed fully from "any amount collected by the State under an assignment" before "the remainder of such amount collected" is remitted to the recipient. § 1396k(b). In ADHS' view, this shows that the State must be paid in full from any settlement. See Brief for Petitioners 13. But, even assuming the provision applies in cases where the State does not actively participate in the litigation, ADHS' conclusion rests on a false premise: The

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[10] The effect of the stipulation is the same as if a trial judge had found that Ahlborn's damages amounted to $3,040,708.12 (of which $215,645.30 were for medical expenses), but because of her contributory negligence, she could only recover one-sixth of those damages.

"amount recovered . . . under an assignment" is not, as ADHS assumes, the entire settlement; as explained above, under the federal statute the State's assigned rights extend only to recovery of payments for medical care. Accordingly, what § 1396k(b) requires is that the State be paid first out of any damages representing payments for medical care before the recipient can recover any of her own costs for medical care.[11]

At the very least, then, the federal third-party liability provisions *require* an assignment of no more than the right to recover that portion of a settlement that represents payments for medical care.[12] They did not mandate the enactment of the Arkansas scheme that we have described.

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[11] Implicit in ADHS' interpretation of this provision is the assumption that there can be no "remainder" to remit to the Medicaid recipient if all the State has been assigned is the right to damages for medical expenses. That view in turn seems to rest on an assumption either that Medicaid will have paid all the recipient's medical expenses or that Medicaid's expenses will always exceed the portion of any third-party recovery earmarked for medical expenses. Neither assumption holds up. First, as both the Solicitor General and CMS acknowledge, the recipient often will have paid medical expenses out of her own pocket. See Brief for United States as *Amicus Curiae* 12 (under § 1396k(b), "the beneficiary retains the right to payment for any additional medical expenses personally incurred either before or subsequent to Medicaid eligibility and for other damages"); CMS, State Medicaid Manual § 3907, available at https://www.lexis.com>Legal>Secondary Legal>CCH>Health Law>CMS Program Manuals>CCH CMS Program Manuals P 3907 (as updated Mar. 25, 2006, and available in Clerk of Court's case file) (envisioning that "medical insurance payments," for example, will be remitted to the recipient if possible). Second, even if Medicaid's outlays often exceed the portion of the recovery earmarked for medical expenses in tort cases, the third-party liability provisions were not drafted exclusively with tort settlements in mind. In the case of health insurance, for example, the funds available under the policy may be enough to cover both Medicaid's costs and the recipient's own medical expenses.

[12] ADHS concedes that, had a jury or judge allocated a sum for medical payments out of a larger award in this case, the agency would be entitled to reimburse itself only from the portion so allocated. See Brief for Peti-

## IV

If there were no other relevant provisions in the federal statute, the State might plausibly argue that federal law supplied a recovery "floor" upon which States were free to build. In fact, though, the federal statute places express limits on the State's powers to pursue recovery of funds it paid on the recipient's behalf. These limitations are contained in 42 U. S. C. §§ 1396a(a)(18) and 1396p. Section 1396a(a)(18) requires that a state Medicaid plan comply with § 1396p, which in turn prohibits States (except in circumstances not relevant here) from placing liens against, or seeking recovery of benefits paid from, a Medicaid recipient:

> "(a) Imposition of lien against property of an individual on account of medical assistance rendered to him under a State plan
>
> "(1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except—
>
> "(A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or
>
> "(B) [in certain circumstances not relevant here]
>
> . . . . .
>
> "(b) Adjustment or recovery of medical assistance correctly paid under a State plan
>
> "(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the

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tioners 49, n. 13; see also Brief for United States as *Amicus Curiae* 22, n. 14 (noting that the Secretary of HHS "ordinarily accepts" a jury allocation of medical damages in satisfaction of the Medicaid debt, even where smaller than the amount of Medicaid's expenses). Given the stipulation between ADHS and Ahlborn, there is no textual basis for treating the settlement here differently from a judge-allocated settlement or even a jury award; all such awards typically establish a third party's "liability" for both "payment for medical care" and other heads of damages.

> State plan may be made, except [in circumstances not relevant here]." § 1396p.

Read literally and in isolation, the anti-lien prohibition contained in § 1396p(a) would appear to ban even a lien on that portion of the settlement proceeds that represents payments for medical care.[13] Ahlborn does not ask us to go so far, though; she assumes that the State's lien is consistent with federal law insofar as it encumbers proceeds designated as payments for medical care. Her argument, rather, is that the anti-lien provision precludes attachment or encumbrance of the remainder of the settlement.

We agree. There is no question that the State can require an assignment of the right, or chose in action, to receive payments for medical care. So much is expressly provided for by §§ 1396a(a)(25) and 1396k(a). And we assume, as do the parties, that the State can also demand as a condition of Medicaid eligibility that the recipient "assign" in advance any payments that may constitute reimbursement for medical costs. To the extent that the forced assignment is expressly authorized by the terms of §§ 1396a(a)(25) and 1396k(a), it is an exception to the anti-lien provision. See *Washington State Dept. of Social and Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U. S. 371, 383–385, and n. 7 (2003). But that does not mean that the State can force an assignment of, or place a lien on, any other portion of Ahlborn's property. As explained above, the exception carved out by

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[13] Likewise, subsection (b) would appear to forestall any attempt by the State to recover benefits paid, at least from the "individual." See, *e. g.*, *Martin ex rel. Hoff* v. *Rochester*, 642 N. W. 2d 1, 8, n. 6 (Minn. 2002); *Wallace* v. *Estate of Jackson*, 972 P. 2d 446, 450 (Utah 1998) (Durham, J., dissenting) (reading § 1396p to "prohibi[t] not only liens against Medicaid recipients but also any recovery for medical assistance correctly paid"). The parties here, however, neither cite nor discuss the antirecovery provision of § 1396p(b). Accordingly, we leave for another day the question of its impact on the analysis.

§§ 1396a(a)(25) and 1396k(a) is limited to payments for medical care. Beyond that, the anti-lien provision applies.

ADHS tries to avoid the anti-lien provision by characterizing the settlement proceeds as not Ahlborn's "property."[14] Its argument appears to be that the automatic assignment effected by the Arkansas statute rendered the proceeds the property of the State.[15] See Brief for Petitioners 31 ("[U]nder Arkansas law, the lien does not attach to the recipient's 'property' because it attaches only to those proceeds already assigned to the Department as a condition of Medicaid eligibility"). That argument fails for two reasons. First, ADHS insists that Ahlborn at all times until judgment retained her entire chose in action—a right that included her claim for medical damages. The statutory lien, then, cannot have attached until the proceeds materialized. That much is clear from the text of the Arkansas statute, which says that the "assignment shall be considered a statutory lien on any settlement . . . *received by the recipient from a third party.*" Ark. Code Ann. § 20–77–307(c) (2001) (emphasis added). The settlement is not "received" until the chose in action has been reduced to proceeds in Ahlborn's possession. Accordingly, the assertion that any of the proceeds belonged to the State all along lacks merit.

Second, the State's argument that Ahlborn lost her property rights in the proceeds the instant she applied for medical assistance is inconsistent with the creation of a statutory lien on those proceeds. Why, after all, would ADHS need a lien on its own property? A lien typically is imposed on the property of *another* for payment of a debt owed by that other. See Black's Law Dictionary 922 (6th ed. 1990). Nothing in the Arkansas statute defines the term otherwise.

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[14] "Property" is defined by regulation as "the homestead and all other personal and real property in which the recipient has a legal interest." 42 CFR § 433.36(b) (2005).

[15] The United States as *amicus curiae* makes the different argument that the proceeds never became Ahlborn's "property" because "to the extent the third party's payment passes through the recipient's hands en route to the State, it comes with the State's lien already attached." Brief as *Amicus Curiae* 18. Even if that reading were consistent with the Arkansas statute (and it is not, see *infra* this page), the United States' characterization of the "assignment" simply reinforces Ahlborn's point: This is a lien that attaches *to the property of the recipient.*

That the lien is also called an "assignment" does not alter the analysis. The terms that Arkansas employs to describe the mechanism by which it lays claim to the settlement proceeds do not, by themselves, tell us whether the statute violates the anti-lien provision. See *United States* v. *Craft,* 535 U. S. 274, 279 (2002); *Drye* v. *United States,* 528 U. S. 49, 58–61 (1999). Although denominated an "assignment," the effect of the statute here was not to divest Ahlborn of all her property interest; instead, Ahlborn retained the right to sue for medical care payments, and the State asserted a right to the fruits of that suit once they materialized. In effect, and as at least some of the statutory language recognizes, Arkansas has imposed a lien on Ahlborn's property.[16] Since none of the federal third-party liability provisions excepts that lien from operation of the anti-lien provision, its imposition violates federal law.

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[16] Because ADHS insists that "Arkansas law did *not* require Ahlborn to assign her claim or her right to sue," Brief for Petitioners 33 (emphasis in original), we need not reach the question whether a State may force a recipient to assign a chose in action to receive as much of the settlement as is necessary to pay Medicaid's costs. The Eighth Circuit thought this would be impermissible because the State cannot "circumvent the restrictions of the federal anti-lien statute simply by requiring an applicant for Medicaid benefits to assign property rights to the State before the applicant liquidates the property to a sum certain." App. to Pet. for Cert. 6. Indeed, ADHS acknowledges that Arkansas cannot, for example, require a Medicaid applicant to assign in advance any right she may have to recover an inheritance or an award in a civil case not related to her injuries or medical care. This arguably is no different; as with assignment of those other choses in action, assignment of the right to compensation for lost wages and other nonmedical damages is nowhere authorized by the federal third-party liability provisions.

## V

ADHS and its *amici* urge, however, that even if a lien on more than medical damages would violate federal law in some cases, a rule permitting such a lien ought to apply here either because Ahlborn breached her duty to "cooperate" with ADHS or because there is an inherent danger of manipulation in cases where the parties to a tort case settle without judicial oversight or input from the State. Neither argument is persuasive.

The United States proposes a default rule of full reimbursement whenever the recipient breaches her duty to "cooperate," and asserts that Ahlborn in fact breached that duty.[17] But, even if the Government's allegations of obstruction were supported by the record, its conception of the duty to cooperate strays far beyond the text of the statute and the relevant regulations. The duty to cooperate arises principally, if not exclusively, in proceedings initiated *by the State* to recover from third parties. See 42 U. S. C. § 1396k(a)(1)(C) (recipients must "cooperate with the State in identifying . . . and providing information to assist the State in pursuing" third parties). Most of the accompanying federal regulations simply echo this basic duty; all they add is that the recipient must "[p]ay to the agency any support or medical care funds received that are covered by the assignment of rights." 42 CFR § 433.147(b)(4) (2005).

In any event, the aspersions the United States casts upon Ahlborn are entirely unsupported; all the record reveals is that ADHS, despite having intervened in the lawsuit and asked to be apprised of any hearings, neither asked to be nor was involved in the settlement negotiations. Whatever the bounds of the duty to cooperate, there is no evidence that it was breached here.

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[17] See, *e. g.*, Brief for United States as *Amicus Curiae* 14 (alleging that Ahlborn "omitt[ed] or understat[ed] the medical damages claim from her lawsuit and attempt[ed] to horde for herself the third-party liability payments"); *id.*, at 15 ("[H]aving forsaken her federal and state statutory duties of candid and forthcoming cooperation[,] respondent, rather than the taxpayers, must bear the financial consequences of her actions"); *id.*, at 21, 24 (referring to Ahlborn's "backdoor settlement" and "obstruction and attrition," as well as her "calculated evasion of her legal obligations").

ADHS' and the United States' alternative argument that a rule of full reimbursement is needed generally to avoid the risk of settlement manipulation is more colorable, but ultimately also unpersuasive. The issue is not, of course, squarely presented here; ADHS has stipulated that only $35,581.47 of Ahlborn's settlement proceeds properly are designated as payments for medical costs. Even in the absence of such a postsettlement agreement, though, the risk that parties to a tort suit will allocate away the State's interest can be avoided either by obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision.[18] For just as there are risks in underestimating the value of readily calculable damages in settlement negotiations, so also is there a countervailing concern that a rule of absolute priority might preclude settlement in a large number of cases, and be unfair to the recipient in others.[19]

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[18] As one *amicus* observes, some States have adopted special rules and procedures for allocating tort settlements in circumstances where, for example, private insurers' rights to recovery are at issue. See Brief for Association of Trial Lawyers of America 20–21. Although we express no view on the matter, we leave open the possibility that such rules and procedures might be employed to meet concerns about settlement manipulation.

[19] The point is illustrated by state cases involving the recovery of workers' compensation benefits paid to an employee (or the family of an employee) whose injuries were caused by a third-party tortfeasor. In *Flanigan* v. *Department of Labor and Industry*, 123 Wash. 2d 418, 869 P. 2d 14 (1994), for example, the court concluded that the state agency could not satisfy its lien out of damages the injured worker's spouse recovered as compensation for loss of consortium. The court explained that the department could not "share in damages for which it has provided no compensation" because such a result would be "absurd and fundamentally unjust." *Id.*, at 426, 869 P. 2d, at 17.

## VI

Finally, ADHS contends that the Court of Appeals' decision below accords insufficient weight to two decisions by the Departmental Appeals Board of HHS (Board) rejecting appeals by the States of California and Washington from denial of reimbursement for costs those States paid on behalf of Medicaid recipients who had settled tort claims. See App. to Pet. for Cert. 45–67 (reproducing *In re Washington State Dept. of Social & Health Servs.*, Dec. No. 1561, 1996 WL 157123 (HHS Dept. App. Bd., Feb. 7, 1996)); App. to Pet. for Cert. 68–86 (reproducing *In re California Dept. of Health Servs.*, Dec. No. 1504, 1995 WL 66334 (HHS Dept. App. Bd., Jan. 5, 1995)). Because the opinions in those cases address a different question from the one posed here, make no mention of the anti-lien provision, and, in any event, rest on a questionable construction of the federal third-party liability provisions, we conclude that they do not control our analysis.

Normally, if a State recovers from a third party the cost of Medicaid benefits paid on behalf of a recipient, the Federal Government owes the State no reimbursement, and any funds already paid by the Federal Government must be returned. See 42 CFR § 433.140(a)(2) (2005) (federal financial participation "is not available in Medicaid payments if . . . [t]he agency received reimbursement from a liable third party"); § 433.140(c). Washington and California both had adopted schemes according to which the State refrained from claiming full reimbursement from tort settlements and instead took only a portion of each settlement. (In California, the recipient typically could keep at least 50% of her settlement, see App. to Pet. for Cert. 72; in Washington, the proportion varied from case to case, see *id.*, at 48–51.) Each scheme resulted in the State's having to pay a portion of the recipient's medical costs—a portion for which the State sought partial reimbursement from the Federal Government. CMS (then called HCFA) denied this partial reimbursement on the ground that the States had an absolute duty to seek full payment of medical expenses from third-party tortfeasors.

The Board upheld CMS' determinations. In California's appeal, which came first, the Board concluded that the State's duty to seek recovery of benefits "from available third party sources to the fullest extent possible" included demanding full reimbursement from the entire proceeds of a Medicaid recipient's tort settlement. *Id.,* at 76. The Board acknowledged that § 1396k(a) "refers to assignment only of 'payment for medical care,'" but thought that "the statutory scheme as a whole contemplates that the actual recovery might be greater and, if it is, that Medicaid should be paid first." *Ibid.* The Board gave two other reasons for siding with CMS: First, the legislative history of the third-party liability evinced a congressional intent that "the Medicaid program . . . be reimbursed from available third party sources to the fullest extent possible," *ibid.;* and, second, California had long been on notice that it would not be reimbursed for any shortfall resulting from failure to fully recoup Medicaid's costs from tort settlements, see *id.,* at 77. The Board also opined that the State could not escape its duty to seek full reimbursement by relying on the Medicaid recipient's efforts in litigating her claims. See *id.,* at 79–80.

Finally, responding to the State's argument that its scheme gave Medicaid recipients incentives to sue third-party tortfeasors and thus resulted in both greater recovery and lower costs for the State, the Board observed that "a state is free to allow recipients to retain the state's share" of any recovery, so long as it does not compromise the Federal Government's share. *Id.,* at 85.

The Board reached the same conclusion, by the same means, in the Washington case. See *id.,* at 53–64.

Neither of these adjudications compels us to conclude that Arkansas' statutory lien comports with federal law. First, the Board's rulings address a different question from the one presented here. The Board was concerned with the Federal Government's obligation to reimburse States that had, in its view, failed to seek full recovery of Medicaid's costs and had instead relied on recipients to act as private attorneys general. The Board neither discussed nor even so much as cited the federal anti-lien provision.

Second, the Board's acknowledgment that the assignment of rights required by § 1396k(a) is limited to payments for medical care only reinforces the clarity of the statutory language. Moreover, its resort to "the statutory scheme as a whole" as justification for muddying that clarity is nowhere explained. Given that the only statutory provisions CMS relied on are §§ 1396a(a)(25), 1396k(a), and 1396k(b), see *id.*, at 75–76; *id.*, at 54–55, and given the Board's concession that the first two of these limit the State's assignment to payments for medical care, the "statutory scheme" must mean § 1396k(b). But that provision does not authorize the State to demand reimbursement from portions of the settlement allocated or allocable to nonmedical damages; instead, it gives the State a priority disbursement from the medical expenses portion alone. See *supra*, at 282. In fact, in its adjudication in the Washington case, the Board conceded as much: "[CMS] may require a state to assert a collection priority over funds obtained by Medicaid recipients in [third-party liability] suits *even though the distribution methodology set forth in section [1396k(b)] refers only to payments collected pursuant to assignments for medical care.*" App. to Pet. for Cert. 54 (emphasis added). The Board's reasoning therefore is internally inconsistent.

Third, the Board's reliance on legislative history is misplaced. The Board properly observed that Congress, in crafting the Medicaid legislation, intended that Medicaid be a "payer of last resort." S. Rep. No. 99–146, p. 313 (1985). That does not mean, however, that Congress meant to authorize States to seek reimbursement from Medicaid recipients themselves; in fact, with the possible exception of a lien on payments for medical care, the statute expressly prohibits liens against the property of Medicaid beneficiaries. See 42 U. S. C. § 1396p(a). We recognize that Congress has delegated "broad regulatory authority to the Secretary [of HHS] in the Medicaid area," *Wisconsin Dept. of Health and Family Servs.* v. *Blumer*, 534 U. S. 473, 496, n. 13 (2002), and that agency adjudications typically warrant deference. Here, however, the Board's reasoning couples internal inconsistency with a conscious disregard for the statutory text. Under these circumstances, we decline to treat the agency's reasoning as controlling.

## VII

Federal Medicaid law does not authorize ADHS to assert a lien on Ahlborn's settlement in an amount exceeding $35,581.47, and the federal anti-lien provision affirmatively prohibits it from doing so. Arkansas' third-party liability provisions are unenforceable insofar as they compel a different conclusion. The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

# MARSHALL *v.* MARSHALL

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–1544. Argued February 28, 2006—Decided May 1, 2006

Among longstanding limitations on federal-court jurisdiction otherwise properly exercised are the so-called "domestic relations" and "probate" exceptions. Neither is compelled by the text of the Constitution or federal statute. Both are judicially created doctrines stemming in large measure from misty understandings of English legal history. In view of lower federal-court decisions expansively interpreting the two exceptions, this Court reined in the domestic relations exception in *Ankenbrandt* v. *Richards,* 504 U. S. 689, and endeavored similarly to curtail the probate exception in *Markham* v. *Allen,* 326 U. S. 490.

Petitioner, Vickie Lynn Marshall (Vickie), a.k.a. Anna Nicole Smith, is the surviving widow of J. Howard Marshall II (J. Howard), who died without providing for Vickie in his will. According to Vickie, J. Howard intended to provide for her through a gift in the form of a "catchall" trust. Respondent, E. Pierce Marshall (Pierce), J. Howard's son, was the ultimate beneficiary of J. Howard's estate plan. While the estate was subject to ongoing Texas Probate Court proceedings, Vickie filed for bankruptcy in California. Pierce filed a proof of claim in the Federal Bankruptcy Court, alleging that Vickie had defamed him when, shortly after J. Howard's death, her lawyers told the press that Pierce had engaged in forgery, fraud, and overreaching to gain control of his father's assets. Pierce sought a declaration that his claim was not dischargeable in bankruptcy. Vickie answered, asserting truth as a defense. She also filed counterclaims, among them a claim that Pierce had tortiously interfered with a gift she expected from J. Howard. Vickie's tortious interference counterclaim turned her objection to Pierce's claim into an adversary proceeding, see Fed. Rule Bkrtcy. Proc. 3007, in which the Bankruptcy Court granted summary judgment for Vickie on Pierce's claim and, after a trial on the merits, entered judgment for Vickie on her counterclaim. The court also held that both Vickie's objection to Pierce's claim and her counterclaim qualified as "core proceedings" under 28 U. S. C. § 157, which meant that the court had authority to enter a final judgment disposing of those claims. It awarded Vickie substantial compensatory and punitive damages. Pierce then filed a post-trial motion to dismiss for lack of subject-matter jurisdiction, asserting that Vickie's tortious interference claim could be tried only in the Texas probate proceedings. The Bankruptcy Court denied the motion. Relying on *Markham,* the Bankruptcy Court observed that a federal court has jurisdiction to adjudicate rights in probate property, so long as its final judgment does not interfere with the state court's possession of the property. Subsequently, the Texas Probate Court declared that J. Howard's estate plan was valid.

Back in the federal forum, Pierce sought district-court review of the Bankruptcy Court's judgment. Among other things, the District Court held that the probate exception did not reach Vickie's counterclaim. Citing *Markham,* 326 U. S., at 494, the court said that the exception would bar federal jurisdiction only if such jurisdiction would "interfere" with the probate proceedings. It would not do so, the court concluded, because: (1) success on Vickie's counterclaim did not necessitate any declaration that J. Howard's will was invalid, and (2) under Texas law, probate courts do not have exclusive jurisdiction to entertain claims of the kind Vickie's counterclaim asserted. The court also held that Vickie's claim did not qualify as a "core proceedin[g]" over which a bankruptcy court may exercise plenary power, see 28 U. S. C. § 157(b)–(c). Accordingly, the District Court treated the Bankruptcy Court's judgment as proposed, rather than final, and undertook *de novo* review. Adopting and supplementing the Bankruptcy Court's findings, the District Court determined that Pierce had tortiously interfered with Vickie's expectancy by, *inter alia,* conspiring to suppress or destroy the *inter vivos* trust instrument J. Howard had directed his lawyers to prepare for Vickie, and to strip J. Howard of his assets by backdating, altering, and otherwise falsifying documents and presenting them to J. Howard under false pretenses. The District Court awarded Vickie some $44.3 million in compensatory damages and, based on "overwhelming" evidence of Pierce's willfulness, maliciousness, and fraud, an equal amount in punitive damages.

The Ninth Circuit reversed. Although the Court of Appeals recognized that Vickie's claim does not involve the administration of an estate, the probate of a will, or any other purely probate matter, it nonetheless held that the probate exception bars federal jurisdiction in this case. It read the exception broadly to exclude from the federal courts' adjudicatory authority not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument, whether those questions involve fraud, undue influence, or tortious interference with the testator's intent. The court also held that a State's vesting of exclusive jurisdiction over probate matters in a special court strips federal courts of jurisdiction to entertain any probate related matter, including claims respecting tax liability, debt, gift, and tort. Noting that the Probate Court had ruled it had exclusive jurisdiction over all of Vickie's claims, the Ninth Circuit held that ruling binding on the Federal District Court.

*Held:* The Ninth Circuit had no warrant from Congress, or from this Court's decisions, for its sweeping extension of the probate exception recognized in those decisions. Because this case does not fall within the exception's scope, the District Court properly asserted jurisdiction over Vickie's counterclaim against Pierce. Pp. 305–315.

(a) *Ankenbrandt* addressed the domestic relations exception's derivation and limits. Among other things, the Court, 504 U. S., at 693–695, traced the current exception to *Barber* v. *Barber*, 21 How. 582, 584–589, in which the Court had announced in dicta—without citation or discussion—that federal courts lack jurisdiction over suits for divorce or alimony. Finding no Article III impediment to federal-court jurisdiction in domestic relations cases, 504 U. S., at 695–697, the *Ankenbrandt* Court, *id.*, at 698–701, anchored the exception in the Judiciary Act of 1789, which, until 1948, provided circuit-court diversity jurisdiction over "all suits of a civil nature at common law or in equity." The *Barber* majority, the *Ankenbrandt* Court acknowledged, 504 U. S., at 698, did not expressly tie its announcement of a domestic relations exception to the text of the diversity statute, but the *Barber* dissenters made the connection. Because English chancery courts lacked authority to issue divorce and alimony decrees, the dissenters stated, United States courts similarly lacked authority to decree divorces or award alimony, 21 How., at 605. The *Ankenbrandt* Court was "content" "to rest [its] conclusion that a domestic relations exception exists as a matter of statutory construction not on the accuracy of [*Barber*'s] historical justifications," but, "rather," on "Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948," 504 U. S., at 700. *Ankenbrandt* further determined that Congress did not intend to terminate the exception in 1948 when it "replace[d] the law/equity distinction with the phrase 'all civil actions.'" *Ibid.* The *Ankenbrandt* Court nevertheless emphasized that the exception covers only "a narrow range of domestic relations issues." *Id.*, at 701. Noting that some lower federal courts had applied the exception "well beyond the circumscribed situations posed by *Barber* and its progeny," *ibid.*, the Court clarified that only "divorce, alimony, and child custody decrees" remain outside federal jurisdictional bounds, *id.*, at 703, 704. While recognizing state tribunals' "special proficiency" in handling issues arising in the granting of such decrees, *id.*, at 704, the Court viewed federal courts as equally equipped to deal with complaints alleging torts, *ibid.* Pp. 305–308.

(b) This Court has recognized a probate exception, kin to the domestic relations exception, to otherwise proper federal jurisdiction. See, *e. g., Markham,* the Court's most recent and pathmarking pronouncement on the subject. Among other things, the *Markham* Court first stated that, although "a federal court has no jurisdiction to probate a will or administer an estate, . . . it has [long] been established . . . that federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." 326 U. S., at 494. The Court next described a probate exception of distinctly limited scope: "[W]hile a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, . . . it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court." *Ibid.* The first of these quoted passages is not a model of clear statement, and some lower federal courts have read the words "interfere with the probate proceedings" to block federal jurisdiction over a range of matters well beyond probate of a will or administration of a decedent's estate, including an executor's breach of fiduciary duty. This Court reads *Markham*'s enigmatic words, in sync with the second above-quoted passage, to proscribe "disturb[ing] or affect[ing] the possession of property in the custody of a state court." *Ibid.* Though that reading renders the first-quoted passage in part redundant, redundancy in this context is preferable to incoherence. This Court therefore comprehends *Markham*'s "interference" language as essentially a reiteration of the general principle that, when one court is exercising *in rem* jurisdiction over a *res,* a second court will not assume *in rem* jurisdiction over the same *res.* See, *e. g., Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader,* 294 U. S. 189, 195–196. Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from disposing of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction. Pp. 308–312.

(c) Vickie's claim does not involve the administration of an estate, the probate of a will, or any other purely probate matter. Provoked by Pierce's claim in the bankruptcy proceedings, Vickie's claim alleges the widely recognized tort of interference with a gift or inheritance. She seeks an *in personam* judgment against Pierce, not the probate or annulment of a will. Cf. *Sutton* v. *English,* 246 U. S. 199, 208. Nor does she seek to reach a *res* in a state court's custody. See *Markham,* 326 U. S., at 494. Furthermore, no "sound policy considerations" militate in favor of extending the probate exception to cover this case. Cf. *Ankenbrandt,* 504 U. S., at 703. Trial courts, both federal and state, often address conduct of the kind Vickie alleges. State probate courts possess no "special proficiency" in handling such issues. Cf. *id.,* at 704. P. 312.

(d) This Court rejects the Ninth Circuit's alternate rationale that the Texas Probate Court's jurisdictional ruling bound the Federal District Court. Texas courts have recognized a state-law tort action for interference with an expected gift or inheritance. It is clear, under *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, that Texas law governs the substantive elements of Vickie's tortious interference claim. But it is also clear that Texas may not reserve to its probate courts the exclusive right to adjudicate a transitory tort. See *Tennessee Coal, Iron & R. Co.* v. *George,* 233 U. S. 354, 360. Jurisdiction is determined "by the law of the court's creation and cannot be defeated by the extraterritorial operation of a [state] statute . . . , even though it created the right of action." *Ibid.* Directly on point, the Court has held that federal-court jurisdiction, "having existed from the beginning of the Federal government, [can]not be impaired by subsequent state legislation creating courts of probate." *McClellan* v. *Carland,* 217 U. S. 268, 281. *Durfee* v. *Duke,* 375 U. S. 106, on which the Ninth Circuit relied, is not to the contrary. *Durfee* stands only for the proposition that a state court's final judgment determining *its own* jurisdiction ordinarily qualifies for full faith and credit, so long as the jurisdictional issue was fully and fairly litigated in the court that rendered the judgment. See *id.,* at 111, 115. At issue here, however, is not the Texas Probate Court's jurisdiction, but the federal courts' jurisdiction to entertain Vickie's tortious interference claim. Under our federal system, Texas cannot render its probate courts exclusively competent to entertain a claim of that genre. Pp. 312–314.

(e) The Ninth Circuit may address on remand the questions whether Vickie's claim was "core" and Pierce's arguments concerning claim and issue preclusion. Pp. 314–315.

392 F. 3d 1118, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, SOUTER, THOMAS, BREYER, and ALITO, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 315.

*Kent L. Richland* argued the cause for petitioner. With him on the briefs were *Dana Gardner Adelstein, Alan Diamond, Edward L. Xanders,* and *Philip W. Boesch, Jr.*

*Deanne E. Maynard* argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Clement, Assistant Attorney General O'Connor, Deputy Solicitor General Hungar, Deputy Assistant Attorney General Morrison, Jonathan S. Cohen,* and *Joan I. Oppenheimer.*

*G. Eric Brunstad, Jr.,* argued the cause for respondent. With him on the brief were *Rheba Rutkowski, Robert A. Brundage, Susan Kim, William C. Heuer, Thomas C. Goldstein, Amy Howe, Kevin K. Russell,* and *Kent L. Jones.**

JUSTICE GINSBURG delivered the opinion of the Court.

In *Cohens* v. *Virginia,* Chief Justice Marshall famously cautioned: "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." 6 Wheat. 264, 404 (1821). Among longstanding limitations on federal jurisdiction otherwise properly exercised are the so-called "domestic relations" and "probate" exceptions. Neither is compelled by the text of the Constitution or federal statute. Both are judicially created doctrines stemming in large measure from misty understandings of English legal history. See, *e. g.*, Atwood, Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction, 35 Hastings L. J. 571, 584–588 (1984); *Spindel* v. *Spindel*, 283 F. Supp. 797, 802 (EDNY 1968) (collecting cases and commentary revealing vulnerability of historical explanation for domestic relations exception); Winkler, The Probate Jurisdiction of the Federal Courts, 14 Probate L. J. 77, 125–126, and n. 256 (1997) (describing historical explanation for probate exception as "an exercise in mythography"). In the years following Marshall's 1821 pronouncement, courts have sometimes lost sight of his admonition and have rendered decisions expansively interpreting the two exceptions. In *Ankenbrandt* v. *Richards*, 504 U. S. 689 (1992), this Court reined in the "domestic relations exception." Earlier, in *Markham* v. *Allen*, 326 U. S. 490 (1946), the Court endeavored similarly to curtail the "probate exception."

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**Richard Lieb* filed a brief of *amici curiae* urging reversal for Richard Aaron et al.

Briefs of *amici curiae* urging affirmance were filed for the State of Texas et al. by *Greg Abbott,* Attorney General of Texas, *Barry R. McBee,* First Assistant Attorney General, *Edward D. Burbach,* Deputy Attorney General for Litigation, *R. Ted Cruz,* Solicitor General, and *Rance L. Craft,* Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *John W. Suthers* of Colorado, *Charles C. Foti, Jr.,* of Louisiana, *J. Joseph Curran, Jr.,* of Maryland, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, and *Hardy Myers* of Oregon; for the National College of Probate Judges by *James R. Wade;* for the Philanthropy Roundtable by *Ronald A. Cass;* for the Washington Legal Foundation by *Sidney P. Levinson, Daniel J. Popeo,* and *Paul D. Kamenar;* for Bonnie Snavely by *Carter G. Phillips* and *Jay T. Jorgensen;* and for Ernest A. Young et al. by *Craig Goldblatt.*

*Robert Whitman* filed a brief of *amicus curiae* for Heirs, Inc.

Nevertheless, the Ninth Circuit in the instant case read the probate exception broadly to exclude from the federal courts' adjudicatory authority "not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." 392 F. 3d 1118, 1133 (2004). The Court of Appeals further held that a State's vesting of exclusive jurisdiction over probate matters in a special court strips federal courts of jurisdiction to entertain any "probate related matter," including claims respecting "tax liability, debt, gift, [or] tort." *Id.*, at 1136. We hold that the Ninth Circuit had no warrant from Congress, or from decisions of this Court, for its sweeping extension of the probate exception.

## I

Petitioner, Vickie Lynn Marshall (Vickie), also known as Anna Nicole Smith, is the surviving widow of J. Howard Marshall II (J. Howard). Vickie and J. Howard met in October 1991. After a courtship lasting more than two years, they were married on June 27, 1994. J. Howard died on August 4, 1995. Although he lavished gifts and significant sums of money on Vickie during their courtship and marriage, J. Howard did not include anything for Vickie in his will. According to Vickie, J. Howard intended to provide for her financial security through a gift in the form of a "catchall" trust.

Respondent, E. Pierce Marshall (Pierce), one of J. Howard's sons, was the ultimate beneficiary of J. Howard's estate plan, which consisted of a living trust and a "pourover" will. Under the terms of the will, all of J. Howard's assets not already included in the trust were to be transferred to the trust upon his death.

Competing claims regarding J. Howard's fortune ignited proceedings in both state and federal courts. In January 1996, while J. Howard's estate was subject to ongoing proceedings in Probate Court in Harris County, Texas, Vickie filed for bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U. S. C. § 1101 *et seq.*, in the United States Bankruptcy Court for the Central District of California. See 275 B. R. 5, 8 (CD Cal. 2002). In June 1996, Pierce filed a proof of claim in the federal bankruptcy proceeding, *id.*, at 9; see 11 U. S. C. § 501, alleging that Vickie had defamed him when, shortly after J. Howard's death, lawyers representing Vickie told members of the press that Pierce had engaged in forgery, fraud, and overreaching to gain control of his father's assets, 275 B. R., at 9. Pierce sought a declaration that the debt he asserted in that claim was not dischargeable in bankruptcy. *Ibid.*[1] Vickie answered, asserting truth as a defense. She also filed counterclaims, among them a claim that Pierce had tortiously interfered with a gift she expected. *Ibid.;* see App. 23–25. Vickie alleged that Pierce prevented the transfer of his father's intended gift to her by, among other things: effectively imprisoning J. Howard against his wishes; surrounding him with hired guards for the purpose of preventing personal contact between him and Vickie; making misrepresentations to J. Howard; and transferring property against J. Howard's expressed wishes. *Id.*, at 24.

Vickie's tortious interference counterclaim turned her objection to Pierce's claim into an adversary proceeding. *Id.*, at 39; see Fed. Rule Bkrtcy. Proc. 3007. In that proceeding, the Bankruptcy Court granted summary judgment in favor of Vickie on Pierce's claim and, after a trial on the merits, entered judgment for Vickie on her tortious interference counterclaim. See 253 B. R. 550, 558–559 (2000). The Bankruptcy Court also held that both Vickie's objection to Pierce's claim and Vickie's counterclaim qualified as "core proceedings" under 28 U. S. C. § 157, which meant that the court had authority to enter a final judgment disposing of those claims. See 257 B. R. 35, 39–40 (2000). The court awarded Vickie compensatory damages of more than $449 million—less whatever she recovered in the ongoing probate action in Texas—as well as $25 million in punitive damages. *Id.*, at 40.

Pierce filed a post-trial motion to dismiss for lack of subject-matter jurisdiction, asserting that Vickie's tortious interference claim could be tried only in the Texas probate proceedings. *Id.*, at 36. The Bankruptcy Court held that

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[1] Among debts not dischargeable in bankruptcy, see 11 U. S. C. § 523(a), are those arising from "willful and malicious injury by the debtor," § 523(a)(6).

"the 'probate exception' argument was waived" because it was not timely raised. *Id.*, at 39. Relying on this Court's decision in *Markham*, the court observed that a federal court has jurisdiction to "adjudicate rights in probate property, so long as its final judgment does not undertake to interfere with the state court's possession of the property." 257 B. R., at 38 (citing *Markham*, 326 U. S., at 494).

Meanwhile, in the Texas Probate Court, Pierce sought a declaration that the living trust and his father's will were valid. 392 F. 3d, at 1124–1125. Vickie, in turn, challenged the validity of the will and filed a tortious interference claim against Pierce, *ibid.*, but voluntarily dismissed both claims once the Bankruptcy Court entered its judgment, *id.*, at 1128. Following a jury trial, the Probate Court declared the living trust and J. Howard's will valid. *Id.*, at 1129.

Back in the federal forum, Pierce sought district-court review of the Bankruptcy Court's judgment. While rejecting the Bankruptcy Court's determination that Pierce had forfeited any argument based on the probate exception, the District Court held that the exception did not reach Vickie's claim. 264 B. R. 609, 619–625 (CD Cal. 2001). The Bankruptcy Court "did not assert jurisdiction generally over the probate proceedings . . . or take control over [the] estate's assets," the District Court observed, *id.*, at 621, "[t]hus, the probate exception would bar federal jurisdiction over Vickie's counterclaim only if such jurisdiction would 'interfere' with the probate proceedings," *ibid.* (quoting *Markham*, 326 U. S., at 494). Federal jurisdiction would not "interfere" with the probate proceedings, the District Court concluded, because: (1) success on Vickie's counterclaim did not necessitate any declaration that J. Howard's will was invalid, 264 B. R., at 621; and (2) under Texas law, probate courts do not have exclusive jurisdiction to entertain claims of the kind asserted in Vickie's counterclaim, *id.*, at 622–625.

The District Court also held that Vickie's claim did not qualify as a "core proceedin[g] arising under title 11, or arising in a case under title 11." 28 U. S. C. § 157(b)(1); see 264

B. R., at 625–632. A bankruptcy court may exercise plenary power only over "core proceedings." See § 157(b)–(c).[2] In noncore matters, a bankruptcy court may not enter final judgment; it has authority to issue only proposed findings of fact and conclusions of law, which are reviewed *de novo* by the district court. See § 157(c)(1). Accordingly, the District Court treated the Bankruptcy Court's judgment as "proposed[,] rather than final," and undertook a "comprehensive, complete, and independent review of" the Bankruptcy Court's determinations. *Id.*, at 633.

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[2] "Core proceedings include, but are not limited to—

"(A) matters concerning the administration of the estate;

"(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

"(C) counterclaims by the estate against persons filing claims against the estate;

"(D) orders in respect to obtaining credit;

"(E) orders to turn over property of the estate;

"(F) proceedings to determine, avoid, or recover preferences;

"(G) motions to terminate, annul, or modify the automatic stay;

"(H) proceedings to determine, avoid, or recover fraudulent conveyances;

"(I) determinations as to the dischargeability of particular debts;

"(J) objections to discharges;

"(K) determinations of the validity, extent, or priority of liens;

"(L) confirmations of plans;

"(M) orders approving the use or lease of property, including the use of cash collateral;

"(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

"(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

"(P) recognition of foreign proceedings and other matters under chapter 15 of title 11." 28 U. S. C. § 157(b)(2) (2000 ed. and Supp. V).

Adopting and supplementing the Bankruptcy Court's findings, the District Court determined that Pierce had tortiously interfered with Vickie's expectancy. Specifically, the District Court found that J. Howard directed his lawyers to prepare an *inter vivos* trust for Vickie consisting of half the appreciation of his assets from the date of their marriage. See 275 B. R., at 25–30, 51–53. It further found that Pierce conspired to suppress or destroy the trust instrument and to strip J. Howard of his assets by backdating, altering, and otherwise falsifying documents, arranging for surveillance of J. Howard and Vickie, and presenting documents to J. Howard under false pretenses. See *id.*, at 36–50, 57–58; see also 253 B. R., at 554–556, 559–560. Based on these findings, the District Court awarded Vickie some $44.3 million in compensatory damages. 275 B. R., at 53–57. In addition, finding "overwhelming" evidence of Pierce's "willfulness, maliciousness, and fraud," the District Court awarded an equal amount in punitive damages. *Id.*, at 57–58.

The Court of Appeals for the Ninth Circuit reversed. The appeals court recognized that Vickie's claim "does not involve the administration of an estate, the probate of a will, or any other purely probate matter." 392 F. 3d, at 1133. Nevertheless, the court held that the probate exception bars federal jurisdiction in this case. In the Ninth Circuit's view, a claim falls within the probate exception if it raises "questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument," whether those questions involve "fraud, undue influence[, or] tortious interference with the testator's intent." *Ibid.*

The Ninth Circuit was also of the view that state-court delineation of a probate court's exclusive adjudicatory authority could control federal subject-matter jurisdiction. In this regard, the Court of Appeals stated: "Where a state has relegated jurisdiction over probate matters to a special court and [the] state's trial courts of general jurisdiction do not have jurisdiction to hear probate matters, then the federal courts also lack jurisdiction over probate matters." *Id.*, at 1136. Noting that "[t]he [P]robate [C]ourt ruled it had exclusive jurisdiction over all of Vickie['s] claims," the Ninth Circuit held that "ruling . . . binding on the United States [D]istrict [C]ourt." *Ibid.* (citing *Durfee* v. *Duke*, 375 U. S. 106, 115–116 (1963)).

We granted certiorari, 545 U. S. 1165 (2005), to resolve the apparent confusion among federal courts concerning the scope of the probate exception. Satisfied that the instant case does not fall within the ambit of the narrow exception recognized by our decisions, we reverse the Ninth Circuit's judgment.

## II

In *Ankenbrandt* v. *Richards*, 504 U. S. 689 (1992), we addressed both the derivation and the limits of the "domestic relations exception" to the exercise of federal jurisdiction. Carol Ankenbrandt, a citizen of Missouri, brought suit in Federal District Court on behalf of her daughters, naming as defendants their father (Ankenbrandt's former husband) and his female companion, both citizens of Louisiana. *Id.*, at 691. Ankenbrandt's complaint sought damages for the defendants' alleged sexual and physical abuse of the children. *Ibid.* Federal jurisdiction was predicated on diversity of citizenship. *Ibid.* (citing 28 U. S. C. § 1332). The District Court dismissed the case for lack of subject-matter jurisdiction, holding that Ankenbrandt's suit fell within "the 'domestic relations' exception to diversity jurisdiction." 504 U. S., at 692. The Court of Appeals agreed and affirmed. *Ibid.* We reversed the Court of Appeals' judgment. *Id.*, at 706–707.

Holding that the District Court improperly refrained from exercising jurisdiction over Ankenbrandt's tort claim, *id.*, at 704, we traced explanation of the current domestic relations exception to *Barber* v. *Barber,* 21 How. 582 (1859). See *Ankenbrandt,* 504 U. S., at 693–695. In *Barber,* the Court upheld federal-court authority, in a diversity case, to enforce an alimony award decreed by a state court. In dicta, however, the *Barber* Court announced—without citation or discussion—that federal courts lack jurisdiction over suits for divorce or the allowance of alimony. 21 How., at 584–589; see *Ankenbrandt,* 504 U. S., at 693–695.

Finding no Article III impediment to federal-court jurisdiction in domestic relations cases, *id.,* at 695–697, the Court in *Ankenbrandt* anchored the exception in Congress' original provision for diversity jurisdiction, *id.,* at 698–701. Beginning at the beginning, the Court recalled:

> "The Judiciary Act of 1789 provided that 'the circuit courts shall have original cognizance, concurrent with the courts of the several States, of *all suits of a civil nature at common law or in equity, where the matter in dispute exceeds,* exclusive of costs, the sum or value of *five hundred dollars,* and . . . an alien is a party, or the suit is *between a citizen of the State where the suit is brought, and a citizen of another State.*' " *Id.,* at 698 (quoting Act of Sept. 24, 1789, § 11, 1 Stat. 78; emphasis added in *Ankenbrandt*).

The defining phrase, "all suits of a civil nature at common law or in equity," the Court stressed, remained in successive statutory provisions for diversity jurisdiction until 1948, when Congress adopted the more economical phrase, "all civil actions." 504 U. S., at 698; 1948 Judicial Code and Judiciary Act, 62 Stat. 930, 28 U. S. C. § 1332.

The *Barber* majority, we acknowledged in *Ankenbrandt,* did not expressly tie its announcement of a domestic relations exception to the text of the diversity statute. 504 U. S., at 698. But the dissenters in that case made the connection. They stated that English courts of chancery lacked authority to issue divorce and alimony decrees. Because "the jurisdiction of the courts of the United States in chancery is bounded by that of the chancery in England," *Barber*, 21 How., at 605 (opinion of Daniel, J.), the dissenters reasoned, our federal courts similarly lack authority to decree divorces or award alimony, *ibid.* Such relief, in other words, would not fall within the diversity statute's original grant of jurisdiction over "all suits of a civil nature at common law or in equity." We concluded in *Ankenbrandt* that "it may be inferred fairly that the jurisdictional limitation recognized by the *[Barber]* Court rested on th[e] statutory basis" indicated by the dissenters in that case. 504 U. S., at 699.

We were "content" in *Ankenbrandt* "to rest our conclusion that a domestic relations exception exists as a matter of statutory construction not on the accuracy of the historical justifications on which [the exception] was seemingly based." *Id.*, at 700. "[R]ather," we relied on "Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948, when the statute limited jurisdiction to 'suits of a civil nature at common law or in equity.'" *Ibid.* (quoting 1 Stat. 78). We further determined that Congress did not intend to terminate the exception in 1948 when it "replace[d] the law/equity distinction with the phrase 'all civil actions.'" 504 U. S., at 700. Absent contrary indications, we presumed that Congress meant to leave undisturbed "the Court's nearly century-long interpretation" of the diversity statute "to contain an exception for certain domestic relations matters." *Ibid.*

We nevertheless emphasized in *Ankenbrandt* that the exception covers only "a narrow range of domestic relations issues." *Id.*, at 701. The *Barber* Court itself, we reminded, "sanctioned the exercise of federal jurisdiction over the enforcement of an alimony decree that had been properly obtained in a state court of competent jurisdiction." 504 U. S., at 702. Noting that some lower federal courts had applied the domestic relations exception "well beyond the circumscribed situations posed by *Barber* and its progeny," *id.*, at 701, we clarified that only "divorce, alimony, and child custody decrees" remain outside federal jurisdictional bounds, *id.*, at 703, 704. While recognizing the "special proficiency developed by state tribunals . . . in handling issues that arise in the granting of [divorce, alimony, and child custody] decrees," *id.*, at 704, we viewed federal courts as equally equipped to deal with complaints alleging the commission of torts, *ibid.*

## III

Federal jurisdiction in this case is premised on 28 U. S. C. § 1334, the statute vesting in federal district courts jurisdiction in bankruptcy cases and related proceedings. Decisions of this Court have recognized a "probate exception," kin to the domestic relations exception, to otherwise proper federal jurisdiction. See *Markham*, 326 U. S., at 494; see also *Sutton* v. *English*, 246 U. S. 199 (1918); *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33 (1909). Like the domestic relations exception, the probate exception has been linked to language contained in the Judiciary Act of 1789.

*Markham*, the Court's most recent and pathmarking pronouncement on the probate exception, stated that "the equity jurisdiction conferred by the Judiciary Act of 1789 . . . , which is that of the English Court of Chancery in 1789, did not extend to probate matters." 326 U. S., at 494. See generally Nicolas, Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction, 74 S. Cal. L. Rev. 1479 (2001). As in *Ankenbrandt*, so in this case, "[w]e have no occasion . . . to join the historical debate" over the scope of English chancery jurisdiction in 1789, 504 U. S., at 699, for Vickie Marshall's claim falls far outside the bounds of the probate exception described in *Markham*. We therefore need not consider in this case whether there exists any uncodified probate exception to federal bankruptcy jurisdiction under § 1334.[3]

In *Markham*, the plaintiff Alien Property Custodian[4] commenced suit in Federal District Court against an executor and resident heirs to determine the Custodian's asserted rights regarding a decedent's estate. 326 U. S., at 491–492. Jurisdiction was predicated on § 24(1) of the Judicial Code, now 28 U. S. C. § 1345, which provides for federal jurisdiction over suits brought by an officer of the United States. At the time the federal suit commenced, the estate was undergoing probate administration in a state court. The Custodian had issued an order vesting in himself all right, title, and interest of German legatees. He sought and gained in the District Court a judgment determining that the resident heirs had no interest in the estate, and that the Custodian, substituting himself for the German legatees, was entitled to the entire net estate, including specified real estate passing under the will.

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[3] We note that the broad grant of jurisdiction conferred by § 1334(b) is subject to a mandatory abstention provision applicable to certain state-law claims. Section 1334(c)(2) provides:

> "Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction."

That provision is, in turn, qualified: "Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2)." § 157(b)(4). Because the Bankruptcy Court rejected Pierce's motion for mandatory abstention as untimely, 257 B. R. 35, 39 (CD Cal. 2000), we need not consider whether these provisions might have required abstention upon a timely motion.

[4] Section 6 of the Trading with the Enemy Act, 40 Stat. 415, 50 U. S. C. App., authorizes the President to appoint an official known as the "alien property custodian," who is responsible for "receiv[ing,] . . . hold[ing], administer[ing], and account[ing] for" "all money and property in the United States due or belonging to an enemy, or ally of enemy . . . ." The Act was originally enacted during World War I "to permit, under careful safeguards and restrictions, certain kinds of business to be carried on" among warring nations, and to "provid[e] for the care and administration of the property and property rights of enemies and their allies in this country pending the war." *Markham* v. *Cabell*, 326 U. S. 404, 414, n. 1 (1945) (Burton, J., concurring) (quoting S. Rep. No. 113, 65th Cong., 1st Sess., 1 (1917)).

Reversing the Ninth Circuit, which had ordered the case dismissed for want of federal subject-matter jurisdiction, this Court held that federal jurisdiction was properly invoked. The Court first stated:

> "It is true that a federal court has no jurisdiction to probate a will or administer an estate . . . . But it has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." 326 U. S., at 494 (quoting *Waterman*, 215 U. S., at 43).

Next, the Court described a probate exception of distinctly limited scope:

> "[W]hile a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, . . . it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court." 326 U. S., at 494.

The first of the above-quoted passages from *Markham* is not a model of clear statement. The Court observed that federal courts have jurisdiction to entertain suits to determine the rights of creditors, legatees, heirs, and other claimants against a decedent's estate, "so long as the federal court does not *interfere with the probate proceedings.*" *Ibid.* (emphasis added). Lower federal courts have puzzled over the meaning of the words "interfere with the probate proceedings," and some have read those words to block federal jurisdiction over a range of matters well beyond probate of a will or administration of a decedent's estate. See, *e. g., Mangieri* v. *Mangieri,* 226 F. 3d 1, 2–3 (CA1 2000) (breach of fiduciary duty by executor); *Golden ex rel. Golden* v. *Golden,* 382 F. 3d 348, 360–362 (CA3 2004) (same); *Lepard* v. *NBD Bank, Div. of Bank One,* 384 F. 3d 232, 234–237 (CA6 2004) (breach of fiduciary duty by trustee); *Storm* v. *Storm,* 328 F. 3d 941, 943–945 (CA7 2003) (probate exception bars claim that plaintiff's father tortiously interfered with plaintiff's inheritance by persuading trust grantor to amend irrevocable *inter vivos* trust); *Rienhardt* v. *Kelly,* 164 F. 3d 1296, 1300–1301 (CA10 1999) (probate exception bars claim that defendants exerted undue influence on testator and thereby tortiously interfered with plaintiff's expected inheritance).

We read *Markham*'s enigmatic words, in sync with the second above-quoted passage, to proscribe "disturb[ing] or affect[ing] the possession of property in the custody of a state court." 326 U. S., at 494. True, that reading renders the first-quoted passage in part redundant, but redundancy in this context, we do not doubt, is preferable to incoherence. In short, we comprehend the "interference" language in *Markham* as essentially a reiteration of the general principle that, when one court is exercising *in rem* jurisdiction over a *res,* a second court will not assume *in rem* jurisdiction over the same *res.* See, *e. g., Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader,* 294 U. S. 189, 195–196 (1935); *Waterman,* 215 U. S., at 45–46. Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.

## A

As the Court of Appeals correctly observed, Vickie's claim does not "involve the administration of an estate, the probate of a will, or any other purely probate matter." 392 F. 3d, at 1133. Provoked by Pierce's claim in the bankruptcy proceedings, Vickie's claim, like Carol Ankenbrandt's, alleges a widely recognized tort. See *King* v. *Acker,* 725 S. W. 2d 750, 754 (Tex. App. 1987); 4 Restatement (Second) of Torts § 774B (1977) ("One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that [s]he would otherwise have received is subject to liability to the other for loss of the inheritance or gift."). Vickie seeks an *in personam* judgment against Pierce, not the probate or annulment of a will. Cf. *Sutton,* 246 U. S., at 208 (suit to annul a will found "supplemental to the proceedings for probate of the will" and therefore not cognizable in federal court). Nor does she seek to reach a *res* in the custody of a state court. See *Markham,* 326 U. S., at 494.

Furthermore, no "sound policy considerations" militate in favor of extending the probate exception to cover the case at hand. Cf. *Ankenbrandt,* 504 U. S., at 703. Trial courts, both federal and state, often address conduct of the kind Vickie alleges. State probate courts possess no "special proficiency . . . in handling [such] issues." Cf. *id.,* at 704.

## B

The Court of Appeals advanced an alternate basis for its conclusion that the federal courts lack jurisdiction over Vickie's claim. Noting that the Texas Probate Court "ruled it had exclusive jurisdiction over all of Vickie Lynn Marshall's claims against E. Pierce Marshall," the Ninth Circuit held that "ruling . . . binding on the United States [D]istrict [C]ourt." 392 F. 3d, at 1136. We reject that determination.

Texas courts have recognized a state-law tort action for interference with an expected inheritance or gift, modeled on the Restatement formulation. See *King*, 725 S. W. 2d, at 754; *Brandes* v. *Rice Trust, Inc.*, 966 S. W. 2d 144, 146–147 (Tex. App. 1998).[5] It is clear, under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), that Texas law governs the substantive elements of Vickie's tortious interference claim. It is also clear, however, that Texas may not reserve to its probate courts the exclusive right to adjudicate a transitory tort. We have long recognized that "a State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction." *Tennessee Coal, Iron & R. Co.* v. *George,* 233 U. S. 354, 360 (1914). Jurisdiction is determined "by the law of the court's creation and cannot be defeated by the extraterritorial operation of a [state] statute . . . , even though it created the right of action." *Ibid.* Directly on point, we have held that the jurisdiction of the federal courts, "having existed from the beginning of the Federal government, [can]not be impaired by subsequent state legislation creating courts of probate." *McClellan* v. *Carland,* 217 U. S. 268, 281 (1910) (upholding federal jurisdiction over action by heirs of decedent, who died intestate, to determine their rights in the estate (citing *Waterman,* 215 U. S. 33)).

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[5] Texas appellate courts have on occasion held claims of tortious interference with an expected inheritance "barred" by a prior probate court judgment, apparently applying ordinary principles of preclusion. See, *e. g.*, *Thompson* v. *Deloitte & Touche*, 902 S. W. 2d 13, 16 (Tex. App. 1995) (final probate court judgment bars claim of tortious interference with inheritance expectancy because probate court "necessarily found that [the decedent] signed the will with testamentary capacity, and that it reflected his intent, was not the result of coercion or undue influence, and was valid"); *Neill* v. *Yett*, 746 S. W. 2d 32, 35–36 (Tex. App. 1988) (complaint alleging fraud and tortious interference with inheritance expectancy, filed more than two years after will was admitted to probate, was barred by both the statute of limitations and the final probate judgment, and failed to state the elements of the claim). Neither *Thompson* nor *Neill* questions the Texas trial courts' subject-matter jurisdiction over the claims in question.

Pierce maintains that *Thompson*, *Neill*, and other Texas decisions support his contention that preclusion principles bar Vickie's claim. See Brief for Respondent 36–38. Vickie argues to the contrary. See Brief for Petitioner 42, n. 30 (urging that preclusion does not apply because (1) Vickie's claim was not litigated to final judgment in the Texas probate proceedings; (2) having presented her claim in the Bankruptcy Court years before she joined the Texas will contest, Vickie was not obliged to present her claim in the Texas proceedings; (3) the Bankruptcy Court's judgment preceded the Probate Court judgment; and (4) the Texas Probate Court did not have before it important evidence). See also Tex. Rule Civ. Proc. 97 (2003); *Ingersoll-Rand Co.* v. *Valero Energy Corp.*, 997 S. W. 2d 203, 206–207 (Tex. 1999). The matter of preclusion remains open for consideration on remand. See *infra*, at 315.

Our decision in *Durfee* v. *Duke,* 375 U. S. 106 (1963), relied upon by the Ninth Circuit, 392 F. 3d, at 1136, is not to the contrary. *Durfee* stands only for the proposition that a state court's final judgment determining *its own* jurisdiction ordinarily qualifies for full faith and credit, so long as the jurisdictional issue was fully and fairly litigated in the court that rendered the judgment. See 375 U. S., at 111, 115. At issue here, however, is not the Texas Probate Court's jurisdiction, but the federal courts' jurisdiction to entertain Vickie's tortious interference claim. Under our federal system, Texas cannot render its probate courts exclusively competent to entertain a claim of that genre. We therefore hold that the District Court properly asserted jurisdiction over Vickie's counterclaim against Pierce.

## IV

After determining that Vickie's claim was not a "core proceeding," the District Court reviewed the case *de novo* and entered its final judgment on March 7, 2002. 275 B. R., at 5–8. The Texas Probate Court's judgment became final on February 11, 2002, nearly one month earlier. App. to Pet.

for Cert. 41. The Court of Appeals considered only the issue of federal subject-matter jurisdiction. It did not address the question whether Vickie's claim was "core"; nor did it address Pierce's arguments concerning claim and issue preclusion. 392 F. 3d, at 1137. These issues remain open for consideration on remand.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE STEVENS, concurring in part and concurring in the judgment.

The administration of decedents' estates typically is governed by rules of state law and conducted by state probate courts. Occasionally, however, disputes between interested parties arise, either in the probate proceeding itself or elsewhere, that qualify as cases or controversies that federal courts have jurisdiction to decide. See, *e. g., Reed* v. *Reed,* 404 U. S. 71 (1971). In her opinion for the Court, JUSTICE GINSBURG has cogently explained why this is such a case. I write separately to explain why I do not believe there is any "probate exception" that ousts a federal court of jurisdiction it otherwise possesses.

The familiar aphorism that hard cases make bad law should extend to easy cases as well. *Markham* v. *Allen,* 326 U. S. 490 (1946), like this case, was an easy case. In *Markham,* as here, it was unnecessary to question the historical or logical underpinnings of the probate exception to federal jurisdiction because, whatever the scope of the supposed exception, it did not extend to the case at hand. But *Markham*'s obiter dicta—dicta that the Court now describes as redundant if not incoherent, *ante,* at 311—generated both confusion and abdication of the obligation Chief Justice Marshall so famously articulated, see *Cohens* v. *Virginia,* 6 Wheat. 264, 404 (1821); see also *ante,* at 298–299. While the Court today rightly abandons much of that dicta, I would go further.

The Court is content to adopt the approach it followed in *Ankenbrandt* v. *Richards,* 504 U. S. 689 (1992), and to accept as foundation for the probate exception *Markham's* bald assertion that the English High Court of Chancery's jurisdiction did not "extend to probate matters" in 1789. 326 U. S., at 494; see *ante,* at 308. I would not accept that premise. Not only had the theory *Markham* espoused been only sporadically and tentatively cited as justification for the exception,[1] but the most comprehensive article on the subject has persuasively demonstrated that *Markham's* assertion is "an exercise in mythography."[2]

*Markham's* theory apparently is the source of the Court's reformulated exception, which "reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate." *Ante,* at 311. Although undoubtedly narrower in scope than *Markham's* ill-considered description of the probate carve-out, this description also sweeps too broadly. For the Court has correctly upheld the exercise of federal jurisdiction over actions involving the annulment of wills and the administration of decedents' estates. In *Gaines* v. *Fuentes*, 92 U. S. 10 (1876), for example, the Court held that a defendant in an action to annul a will should be permitted to remove the case to federal court. In so doing, it explained:

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[1] Notably, Justice Joseph Bradley, a strong proponent of the theory that federal courts sitting in equity cannot exercise jurisdiction over probate matters because in England in 1789 such jurisdiction belonged to the ecclesiastical courts, see *Case of Broderick's Will,* 21 Wall. 503 (1875), *Gaines* v. *Fuentes,* 92 U. S. 10, 24–25 (1876) (dissenting opinion), urged that "even in matters savoring of [e]cclesiastical process, after an issue has been formed between definite parties," the controversy should be heard by a federal court. See *Rosenbaum* v. *Bauer,* 120 U. S. 450, 460–461 (1887) (dissenting opinion) (citing *Gaines,* 92 U. S., at 17, and *Hess* v. *Reynolds,* 113 U. S. 73 (1885)).

[2] Winkler, The Probate Jurisdiction of the Federal Courts, 14 Probate L. J. 77, 126 (1997); see *ante,* at 299 (acknowledging Winkler's analysis). Winkler also observes, citing Charles Dickens' Bleak House (1853), that *Markham's* "suggestion that the High Court of Chancery had lacked jurisdiction to 'administer an estate' was preposterous." 14 Probate L. J., at 125, and n. 256.

> "[W]henever a controversy in a suit . . . arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties." *Id.*, at 22.

Likewise, in *Payne* v. *Hook*, 7 Wall. 425 (1869), the Court explained that it was "well settled that a court of chancery, as an incident to its power to enforce trusts, and make those holding a fiduciary relation account, has jurisdiction to compel executors and administrators to account and distribute the assets in their hands." *Id.*, at 431. (In that same case, a federal court later appointed a Special Master to administer the estate. This Court upheld some of the Master's determinations and rejected others. See *Hook* v. *Payne*, 14 Wall. 252, 255 (1872).)

To be sure, there are cases that support limitations on federal courts' jurisdiction over the probate and annulment of wills and the administration of decedents' estates. But careful examination reveals that at least most of the limitations so recognized stem not from some *sui generis* exception, but rather from generally applicable jurisdictional rules. Cf. *Ellis* v. *Davis*, 109 U. S. 485, 497 (1883) ("Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States"). Some of those rules, like the rule that diversity jurisdiction will not attach absent an *inter* *partes* controversy, plainly are still relevant today. See, *e. g., Waterman* v. *Canal-Louisiana Bank & Trust Co.,* 215 U. S. 33, 44–45 (1909); see also *id.,* at 46 (reaffirming the *in gremio legis* principle). Others, like the rule that a bill in equity will lie only where there is no adequate remedy elsewhere, have less straightforward application in the wake of 20th-century jurisdictional developments. See, *e. g., Case of Broderick's Will,* 21 Wall. 503, 510–512 (1875); *Ellis,* 109 U. S., at 503 (denying relief where plaintiff had "a plain, adequate and complete remedy at law"); see also Winkler, *supra* n. 2, at 112–113. Whatever the continuing viability of these individual rules, together they are more than adequate to the task of cabining federal courts' jurisdiction. They require no helping hand from the so-called probate exception.

Rather than preserving whatever vitality that the "exception" has retained as a result of the *Markham* dicta, I would provide the creature with a decent burial in a grave adjacent to the resting place of the *Rooker-Feldman* doctrine. See *Lance* v. *Dennis,* 546 U. S. 459, 468 (2006) (STEVENS, J., dissenting).

# HOLMES *v.* SOUTH CAROLINA

## CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 04–1327. Argued February 22, 2006—Decided May 1, 2006

At petitioner's South Carolina trial for murder and related crimes, the prosecution relied heavily on forensic evidence that strongly supported petitioner's guilt. Petitioner sought to undermine the State's forensic evidence by introducing expert testimony suggesting that the evidence had been contaminated and that the police had engaged in a plot to frame him. Petitioner also sought to introduce evidence that another man, Jimmy McCaw White, had been in the victim's neighborhood on the morning of the assault and that White had either acknowledged petitioner's innocence or admitted to committing the crimes himself. In White's pretrial testimony, he denied making the incriminating statements and provided an alibi for the time of the assault.

The trial court excluded petitioner's third-party guilt evidence citing the State Supreme Court's *Gregory* decision, which held such evidence admissible if it raises a reasonable inference as to the defendant's own innocence, but inadmissible if it merely casts a bare suspicion or raises a conjectural inference as to another's guilt. Affirming the trial court, the State Supreme Court cited both *Gregory* and its later decision in *Gay*, and held that where there is strong forensic evidence of an appellant's guilt, proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence. Applying this standard, the court held that petitioner could not overcome the forensic evidence against him.

*Held:* A criminal defendant's federal constitutional rights are violated by an evidence rule under which the defendant may not introduce evidence of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict. "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *United States* v. *Scheffer*, 523 U. S. 303, 308. This latitude, however, has limits. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane* v. *Kentucky*, 476 U. S. 683, 690. This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer, supra,* at 308.

While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. An application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. Such rules are widely accepted and are not challenged here.

In *Gregory,* the South Carolina Supreme Court adopted and applied a rule intended to be of this type. In *Gay* and this case, however, that court radically changed and extended the *Gregory* rule by holding that, where there is strong evidence of a defendant's guilt, especially strong forensic evidence, proffered evidence about a third party's alleged guilt may (or perhaps must) be excluded. Under this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues. Furthermore, as applied below, the rule seems to call for little, if any, examination of the credibility of the prosecution's witnesses or the reliability of its evidence.

By evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied below did not heed this point, the rule is "arbitrary" in the sense that it does not rationally serve the end that the *Gregory* rule and other similar third-party guilt rules were designed to further. Nor has the State identified any other legitimate end served by the rule. Thus, the rule violates a criminal defendant's right to have "'a meaningful opportunity to present a complete defense.'" *Crane, supra,* at 690. Pp. 324–331.

361 S. C. 333, 605 S. E. 2d 19, vacated and remanded.

ALITO, J., delivered the opinion for a unanimous Court.

*John H. Blume* argued the cause for petitioner. With him on the briefs were *William A. Norris, Edward P. Lazarus,* *Michael C. Small, Mark J. MacDougall, Jeffrey P. Kehne,* and *Sheri L. Johnson.*

*Donald J. Zelenka,* Assistant Deputy Attorney General of South Carolina, argued the cause for respondent. With him on the brief were *Henry D. McMaster,* Attorney General, and *John W. McIntosh,* Chief Deputy Attorney General.

*Steffen N. Johnson* argued the cause for the State of Kansas et al. as *amici curiae* urging affirmance. With him on the brief were *Phill Kline,* Attorney General of Kansas, *Jared Maag,* Deputy Attorney General, and *Gene C. Schaerr,* and the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *John W. Suthers* of Colorado, *Carl C. Danberg* of Delaware, *Mark J. Bennett* of Hawaii, *Lawrence Wasden* of Idaho, *Gregory D. Stumbo* of Kentucky, *Michael A. Cox* of Michigan, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *George J. Chanos* of Nevada, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.,* of Pennsylvania, *Lawrence E. Long* of South Dakota, and *Greg Abbott* of Texas.*

JUSTICE ALITO delivered the opinion of the Court.

This case presents the question whether a criminal defendant's federal constitutional rights are violated by an evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict.

## I

On the morning of December 31, 1989, 86-year-old Mary Stewart was beaten, raped, and robbed in her home. She

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*Briefs of *amici curiae* urging reversal were filed for Forty Professors of Evidence Law by *Samuel R. Gross;* and for the National Association of Criminal Defense Lawyers by *Jeffrey T. Green* and *Richard E. Young.*

*Elaine Metlin* and *Ann-Marie Luciano* filed a brief of *amicus curiae* for the Innocence Project, Inc.

later died of complications stemming from her injuries. Petitioner was convicted by a South Carolina jury of murder, first-degree criminal sexual conduct, first-degree burglary, and robbery, and he was sentenced to death. *State* v. *Holmes*, 320 S. C. 259, 262, 464 S. E. 2d 334, 336 (1995). The South Carolina Supreme Court affirmed his convictions and sentence, and this Court denied certiorari. *Ibid.*, cert. denied, 517 U. S. 1248 (1996). Upon state postconviction review, however, petitioner was granted a new trial. 361 S. C. 333, 335, n. 1, 605 S. E. 2d 19, 20, n. 1 (2004).

At the second trial, the prosecution relied heavily on the following forensic evidence:

> "(1) [Petitioner's] palm print was found just above the door knob on the interior side of the front door of the victim's house; (2) fibers consistent with a black sweatshirt owned by [petitioner] were found on the victim's bed sheets; (3) matching blue fibers were found on the victim's pink nightgown and on [petitioner's] blue jeans; (4) microscopically consistent fibers were found on the pink nightgown and on [petitioner's] underwear; (5) [petitioner's] underwear contained a mixture of DNA from two individuals, and 99.99% of the population other than [petitioner] and the victim were excluded as contributors to that mixture; and (6) [petitioner's] tank top was found to contain a mixture of [petitioner's] blood and the victim's blood." *Id.*, at 343, 605 S. E. 2d, at 24.

In addition, the prosecution introduced evidence that petitioner had been seen near Stewart's home within an hour of the time when, according to the prosecution's evidence, the attack took place. *Id.*, at 337–338, 343, 605 S. E. 2d, at 21, 24.

As a major part of his defense, petitioner attempted to undermine the State's forensic evidence by suggesting that it had been contaminated and that certain law enforcement officers had engaged in a plot to frame him. *Id.*, at 339, 605 S. E. 2d, at 22. Petitioner's expert witnesses criticized the procedures used by the police in handling the fiber and DNA evidence and in collecting the fingerprint evidence. App. 299–311, 313–323. Another defense expert provided testimony that petitioner cited as supporting his claim that the palm print had been planted by the police. *Id.*, at 326–327.

Petitioner also sought to introduce proof that another man, Jimmy McCaw White, had attacked Stewart. 361 S. C., at 340, 605 S. E. 2d, at 22. At a pretrial hearing, petitioner proffered several witnesses who placed White in the victim's neighborhood on the morning of the assault, as well as four other witnesses who testified that White had either acknowledged that petitioner was " 'innocent' " or had actually admitted to committing the crimes. *Id.*, at 340–342, 605 S. E. 2d, at 22–23. One witness recounted that when he asked White about the "word . . . on the street" that White was responsible for Stewart's murder, White "put his head down and he raised his head back up and he said, well, you know I like older women." App. 119. According to this witness, White added that "he did what they say he did" and that he had "no regrets about it at all." *Id.*, at 120. Another witness, who had been incarcerated with White, testified that White had admitted to assaulting Stewart, that a police officer had asked the witness to testify falsely against petitioner, and that employees of the prosecutor's office, while soliciting the witness' cooperation, had spoken of manufacturing evidence against petitioner. *Id.*, at 38–50. White testified at the pretrial hearing and denied making the incriminating statements. 361 S. C., at 341–342, 605 S. E. 2d, at 23. He also provided an alibi for the time of the crime, but another witness refuted his alibi. *Id.*, at 342, 605 S. E. 2d, at 23.

The trial court excluded petitioner's third-party guilt evidence citing *State* v. *Gregory*, 198 S. C. 98, 16 S. E. 2d 532 (1941), which held that such evidence is admissible if it " 'raise[s] a reasonable inference or presumption as to [the defendant's] own innocence' " but is not admissible if it merely "'cast[s] a bare suspicion upon another'" or "'raise[s] a conjectural inference as to the commission of the crime by another.'" App. 133–134 (quoting *Gregory, supra,* at 104, 16 S. E. 2d, at 534). On appeal, the South Carolina Supreme Court found no error in the exclusion of petitioner's third-party guilt evidence. Citing both *Gregory* and its later decision in *State* v. *Gay,* 343 S. C. 543, 541 S. E. 2d 541 (2001), the State Supreme Court held that "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." 361 S. C., at 342–343, 605 S. E. 2d, at 24. Applying this standard, the court held that petitioner could not "overcome the forensic evidence against him to raise a reasonable inference of his own innocence." *Id.,* at 343, 605 S. E. 2d, at 24. We granted certiorari. 545 U. S. 1164 (2005).

## II

"[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *United States* v. *Scheffer,* 523 U. S. 303, 308 (1998); see also *Crane* v. *Kentucky,* 476 U. S. 683, 689–690 (1986); *Marshall* v. *Lonberger,* 459 U. S. 422, 438, n. 6 (1983); *Chambers* v. *Mississippi,* 410 U. S. 284, 302–303 (1973); *Spencer* v. *Texas,* 385 U. S. 554, 564 (1967). This latitude, however, has limits. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane, supra,* at 690 (quoting *California* v. *Trombetta,* 467 U. S. 479, 485 (1984); citations omitted). This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'"

*Scheffer, supra,* at 308 (quoting *Rock* v. *Arkansas,* 483 U. S. 44, 58, 56 (1987)).

This Court's cases contain several illustrations of "arbitrary" rules, *i. e.,* rules that excluded important defense evidence but that did not serve any legitimate interests. In *Washington* v. *Texas,* 388 U. S. 14 (1967), state statutes barred a person who had been charged as a participant in a crime from testifying in defense of another alleged participant unless the witness had been acquitted. As a result, when the defendant in *Washington* was tried for murder, he was precluded from calling as a witness a person who had been charged and previously convicted of committing the same murder. Holding that the defendant's right to put on a defense had been violated, we noted that the rule embodied in the statutes could not "even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury" since the rule allowed an alleged participant to testify if he or she had been acquitted or was called by the prosecution. *Id.,* at 22–23.

A similar constitutional violation occurred in *Chambers* v. *Mississippi, supra.* A murder defendant called as a witness a man named McDonald, who had previously confessed to the murder. When McDonald repudiated the confession on the stand, the defendant was denied permission to examine McDonald as an adverse witness based on the State's " 'voucher' rule," which barred parties from impeaching their own witnesses. *Id.,* at 294. In addition, because the state hearsay rule did not include an exception for statements against penal interest, the defendant was not permitted to introduce evidence that McDonald had made self-incriminating statements to three other persons. Noting that the State had not even attempted to "defend" or "explain [the] underlying rationale" of the "voucher rule," *id.,* at 297, this Court held that "the exclusion of [the evidence of McDonald's out-of-court statements], coupled with the State's refusal to permit [the defendant] to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process," *id.*, at 302.

Another arbitrary rule was held unconstitutional in *Crane* v. *Kentucky, supra.* There, the defendant was prevented from attempting to show at trial that his confession was unreliable because of the circumstances under which it was obtained, and neither the State Supreme Court nor the prosecution "advanced any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence." *Id.*, at 691.

In *Rock* v. *Arkansas, supra,* this Court held that a rule prohibiting hypnotically refreshed testimony was unconstitutional because "[w]holesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all post-hypnosis recollections." *Id.*, at 61. By contrast, in *Scheffer, supra,* we held that a rule excluding all polygraph evidence did not abridge the right to present a defense because the rule "serve[d] several legitimate interests in the criminal trial process," was "neither arbitrary nor disproportionate in promoting these ends," and did not "implicate a sufficiently weighty interest of the defendant." *Id.*, at 309.

While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. See, *e. g.*, Fed. Rule Evid. 403; Uniform Rule of Evid. 45 (1953); ALI, Model Code of Evidence Rule 303 (1942); 3 J. Wigmore, Evidence §§ 1863, 1904 (1904). Plainly referring to rules of this type, we have stated that the Constitution permits judges "to exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *Crane*, 476 U. S., at 689–690 (quoting *Delaware* v. *Van Arsdall*, 475 U. S. 673, 679 (1986); ellipsis and brackets in original). See also *Montana* v. *Egelhoff*, 518 U. S. 37, 42 (1996) (plurality opinion) (terming such rules "familiar and unquestionably constitutional").

A specific application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. See, *e. g.*, 41 C. J. S., Homicide § 216, pp. 56–58 (1991) ("Evidence tending to show the commission by another person of the crime charged may be introduced by accused when it is inconsistent with, and raises a reasonable doubt of, his own guilt; but frequently matters offered in evidence for this purpose are so remote and lack such connection with the crime that they are excluded"); 40A Am. Jur. 2d, Homicide § 286, pp. 136–138 (1999) ("[T]he accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged . . . . [Such evidence] may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial" (footnotes omitted)). Such rules are widely accepted,* and neither petitioner nor his *amici* challenge them here.

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*See, *e. g.*, *Smithart* v. *State*, 988 P. 2d 583, 586–587 (Alaska 1999); *Shields* v. *State*, 357 Ark. 283, 287–288, 166 S. W. 3d 28, 32 (2004); *People* v. *Hall*, 41 Cal. 3d 826, 833, 718 P. 2d 99, 103–104 (1986) (en banc); *People* v. *Mulligan*, 193 Colo. 509, 517–518, 568 P. 2d 449, 456–457 (1977) (en banc); *State* v. *West*, 274 Conn. 605, 624–627, 877 A. 2d 787, 802–803 (2005); *Winfield* v. *United States*, 676 A. 2d 1 (D. C. 1996) (en banc); *Klinect* v. *State*, 269 Ga. 570, 573, 501 S. E. 2d 810, 813–814 (1998); *State* v. *Rabellizsa*, 79 Haw. 347, 350–351, 903 P. 2d 43, 46–47 (1995); *People* v. *Fort*, 248 Ill. App. 3d 301, 314, 618 N. E. 2d 445, 455 (1993); *State* v. *Adams*, 280 Kan. 494, 504–507, 124 P. 3d 19, 27–29 (2005); *Beaty* v. *Commonwealth*, 125 S. W. 3d 196, 207–208 (Ky. 2003); *State* v. *Dechaine*, 572 A. 2d 130, 134 (Me. 1990); *Commonwealth* v. *Scott*, 408 Mass. 811, 815–816, 564 N. E. 2d 370, 374–375

In *Gregory,* the South Carolina Supreme Court adopted and applied a rule apparently intended to be of this type, given the court's references to the "applicable rule" from Corpus Juris and American Jurisprudence:

> "'[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.'" 198 S. C., at 104–105, 16 S. E. 2d, at 534–535 (quoting 16 C. J., Criminal Law § 1085, p. 560 (1918), and 20 Am. Jur., Evidence § 265, p. 254 (1939); footnotes omitted).

In *Gay* and this case, however, the South Carolina Supreme Court radically changed and extended the rule. In *Gay,* after recognizing the standard applied in *Gregory,* the court stated that "[i]n view of the strong evidence of appellant's guilt—especially the forensic evidence— . . . the proffered evidence . . . did not raise 'a reasonable inference' as to

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(1990); *State* v. *Jones,* 678 N. W. 2d 1, 16–17 (Minn. 2004) (en banc); *Moore* v. *State,* 179 Miss. 268, 274–275, 175 So. 183, 184 (1937); *State* v. *Chaney,* 967 S. W. 2d 47, 55 (Mo. 1998) (en banc); *State* v. *Cotto,* 182 N. J. 316, 332–333, 865 A. 2d 660, 669–670 (2005); *Gore* v. *State,* 2005 OK CR 14, ¶¶ 13–24, 119 P. 3d 1268, 1272–1276; *State* v. *Gregory,* 198 S. C. 98, 104–105, 16 S. E. 2d 532, 534–535 (1941); *Wiley* v. *State,* 74 S. W. 3d 399, 405–408 (Tex. Crim. App. 2002); *State* v. *Grega,* 168 Vt. 363, 375, 721 A. 2d 445, 454 (1998); *State* v. *Thomas,* 150 Wash. 2d 821, 856–858, 83 P. 3d 970, 988 (2004) (en banc); *State* v. *Parr,* 207 W. Va. 469, 475, 534 S. E. 2d 23, 29 (2000) *(per curiam); State* v. *Denny,* 120 Wis. 2d 614, 622–625, 357 N. W. 2d 12, 16–17 (App. 1984).

appellant's own innocence." 343 S. C., at 550, 541 S. E. 2d, at 545 (quoting *Gregory, supra,* at 104, 16 S. E. 2d, at 534, in turn quoting 16 C. J., § 1085, at 560). Similarly, in the present case, as noted, the State Supreme Court applied the rule that "where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt" may (or perhaps must) be excluded. 361 S. C., at 342, 605 S. E. 2d, at 24.

Under this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.

Furthermore, as applied in this case, the South Carolina Supreme Court's rule seems to call for little, if any, examination of the credibility of the prosecution's witnesses or the reliability of its evidence. Here, for example, the defense strenuously claimed that the prosecution's forensic evidence was so unreliable (due to mishandling and a deliberate plot to frame petitioner) that the evidence should not have even been admitted. The South Carolina Supreme Court responded that these challenges did not entirely "eviscerate" the forensic evidence and that the defense challenges went to the weight and not to the admissibility of that evidence. *Id.,* at 343, n. 8, 605 S. E. 2d, at 24, n. 8. Yet, in evaluating the prosecution's forensic evidence and deeming it to be "strong"—and thereby justifying exclusion of petitioner's third-party guilt evidence—the South Carolina Supreme Court made no mention of the defense challenges to the prosecution's evidence.

Interpreted in this way, the rule applied by the State Supreme Court does not rationally serve the end that the *Gregory* rule and its analogues in other jurisdictions were designed to promote, *i. e.*, to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues. The rule applied in this case appears to be based on the following logic: Where (1) it is clear that only one person was involved in the commission of a particular crime and (2) there is strong evidence that the defendant was the perpetrator, it follows that evidence of third-party guilt must be weak. But this logic depends on an accurate evaluation of the prosecution's proof, and the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence. Just because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case.

The rule applied in this case is no more logical than its converse would be, *i. e.*, a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing, evidence that, if believed, strongly supports a verdict of not guilty. In the present case, for example, petitioner proffered evidence that, if believed, squarely proved that White, not petitioner, was the perpetrator. It would make no sense, however, to hold that this proffer precluded the prosecution from introducing its evidence, including the forensic evidence that, if credited, provided strong proof of petitioner's guilt.

The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied by the State Supreme Court in this case did not heed this point, the rule is "arbitrary" in the sense that it does not rationally serve the end that the *Gregory* rule and other similar third-party guilt rules were designed to further. Nor has the State identified any other legitimate end that the rule serves. It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have "'a meaningful opportunity to present a complete defense.'" *Crane*, 476 U. S., at 690 (quoting *Trombetta*, 467 U. S., at 485).

## III

For these reasons, we vacate the judgment of the South Carolina Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

*It is so ordered.*

# DAIMLERCHRYSLER CORP. ET AL. *v.* CUNO ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04–1704. Argued March 1, 2006—Decided May 15, 2006*

The city of Toledo and State of Ohio sought to encourage DaimlerChrysler Corp. to expand its Toledo operations by offering it local property tax exemptions and a state franchise tax credit. A group of plaintiffs including Toledo residents who pay state and local taxes sued in state court, alleging that the tax breaks violated the Commerce Clause. The taxpayer plaintiffs claimed injury because the tax breaks depleted the state and local treasuries to which they contributed. Defendants removed the action to District Court. Plaintiffs moved to remand to state court because, *inter alia,* they doubted whether they satisfied either the constitutional or prudential limitations on standing in federal court. The District Court declined to remand the case, concluding that plaintiffs had standing under the "municipal taxpayer standing" rule articulated in *Massachusetts* v. *Mellon,* 262 U. S. 447. On the merits, the court found that neither tax benefit violated the Commerce Clause. Without addressing standing, the Sixth Circuit agreed as to the municipal tax exemption, but held that the state franchise tax credit violated the Commerce Clause. Defendants sought certiorari to review the invalidation of the franchise tax credit, and plaintiffs sought certiorari to review the upholding of the property tax exemption. This Court granted review to consider whether the franchise tax credit violates the Commerce Clause, and directed the parties to address the issue of standing.

*Held:* Plaintiffs have not established their standing to challenge the state franchise tax credit. Because they have no standing to challenge that credit, the lower courts erred by considering their claims on the merits. Pp. 340–354.

1. State taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers. Pp. 340–349.

(a) Before this Court can address the merits of plaintiffs' challenge, it has an obligation to assure itself that the merits question is presented in a proper Article III "case" or "controversy." *Lujan* v. *Defenders of*

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*Together with No. 04–1724, *Wilkins, Tax Commissioner for State of Ohio, et al.* v. *Cuno et al.,* also on certiorari to the same court.

*Wildlife*, 504 U. S. 555, 560. The case-or-controversy limitation is crucial in maintaining the "'tripartite allocation of power'" set forth in the Constitution. *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 474. "Article III standing . . . enforces the . . . case-or-controversy requirement." *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 11. The requisite elements of standing are familiar: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U. S. 737, 751. Plaintiffs, as the parties now asserting federal jurisdiction, must carry the burden of establishing their standing. Pp. 340–342.

(b) Plaintiffs' principal claim that the franchise tax credit depletes state funds to which they contribute through their taxes, and thus diminishes the total funds available for lawful uses and imposes disproportionate burdens on them, is insufficient to establish standing under Article III. This Court has denied *federal* taxpayers standing under Article III to object to a particular expenditure of federal funds simply because they are taxpayers. See, *e. g.*, *Valley Forge Christian College*, *supra*, at 476–482. The animating principle behind cases such as *Valley Forge* was announced in *Frothingham* v. *Mellon*, decided with *Massachusetts* v. *Mellon*, 262 U. S. 447, in which the Court observed that a federal taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity," *id.*, at 487. This rationale applies with undiminished force to state taxpayers who allege simply that a state fiscal decision will deplete the fisc and "impose disproportionate burdens on them." See *Doremus* v. *Board of Ed. of Hawthorne*, 342 U. S. 429, 433–434. Because state budgets frequently have an array of tax and spending provisions that may be challenged on a variety of bases, affording state taxpayers standing to press such challenges simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as "'virtually continuing monitors of the wisdom and soundness'" of state fiscal administration, contrary to the more modest role Article III envisions for federal courts. See *Allen*, *supra*, at 760–761. Pp. 342–346.

(c) Also rejected is plaintiffs' argument that they have state taxpayer standing on the ground that their Commerce Clause challenge is just like the Establishment Clause challenge this Court permitted in *Flast* v. *Cohen*, 392 U. S. 83, 105–106. *Flast* allowed an Establishment Clause challenge by federal taxpayers to a congressional action under Art. I, § 8. Although *Flast* held out the possibility that "specific [constitutional] limitations" other than the Establishment Clause might support federal taxpayer standing, 392 U. S., at 105, 85, only the Establishment Clause has been held to do so since *Flast*, see, *e. g., Bowen* v. *Kendrick*, 487 U. S. 589, 618. Plaintiffs' reliance on *Flast* is misguided: Whatever rights plaintiffs have under the Commerce Clause, they are fundamentally unlike the right not to contribute even "'three pence'" to support a religious establishment that was upheld in *Flast*, 392 U. S., at 103. Indeed, plaintiffs compare the two Clauses at such a high level of generality that almost any constitutional constraint on government power could be likened to the Establishment Clause as interpreted in *Flast*. *Id.*, at 105. And a finding that the Commerce Clause satisfies the *Flast* test because it often implicates governments' fiscal decisions would leave no principled way of distinguishing other constitutional provisions that also constrain governments' taxing and spending decisions. See, *e. g., Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221. Yet such a broad application of *Flast*'s exception to the general prohibition on taxpayer standing would be at odds with *Flast*'s own promise that it would not transform federal courts into forums for taxpayers' "generalized grievances." 392 U. S., at 106. Pp. 347–349.

2. Plaintiffs' status as *municipal* taxpayers does not give them standing to challenge the *state* franchise tax credit at issue.

This Court has noted with approval the standing of municipal taxpayers to enjoin the illegal use of a municipal corporation's funds. See, *e. g., Frothingham, supra*, at 486–487. But plaintiffs' attempts to leverage the notion of municipal taxpayer standing into standing to challenge the state tax credit are unavailing. Pp. 349–354.

(a) Plaintiffs argue that because state law requires revenues from the franchise tax to be distributed to local governments, the award of a credit to DaimlerChrysler reduced such distributions and thus depleted the funds of local governments to which plaintiffs pay taxes. But plaintiffs' challenge is still to the state law and state decision, not those of plaintiffs' municipality. Their argument thus suffers from the same defects that the claim of state taxpayer standing exhibits. Pp. 349–350.

(b) Also rejected is plaintiffs' claim that their standing to challenge the municipal property tax exemption supports jurisdiction over their challenge to the franchise tax credit under the "supplemental jurisdiction" recognized in *Mine Workers* v. *Gibbs*, 383 U. S. 715. *Gibbs* held that federal-question jurisdiction over a claim may authorize a federal court to exercise jurisdiction over state-law claims that may be viewed as part of the same case because they "derive from a common nucleus of operative fact" as the federal claim. *Id.*, at 725. Plaintiffs assume that *Gibbs* stands for the proposition that federal jurisdiction extends to all claims sufficiently related to a claim within Article III to be part of the same case, regardless of the deficiency that would keep the former claims out of federal court if presented on their own. This Court's general approach to the application of *Gibbs* has been markedly more cautious. See, *e. g., Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. 546, 553. The Court has never applied *Gibbs*' rationale to permit a federal court to exercise supplemental jurisdiction over a claim that does not itself satisfy those elements of the Article III inquiry, such as constitutional standing, that "serv[e] to identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U. S. 149, 155. There is no reason to read *Gibbs*' language as broadly as plaintiffs urge, particularly since the Court's standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press, see, *e. g., Allen, supra*, at 752. If standing were commutative, as plaintiffs claim, the Court's insistence that a plaintiff must demonstrate standing separately for each form of relief sought, see, *e. g., Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 185, would make little sense when all claims for relief derive from a "common nucleus of operative fact," as they appear to have in cases like *Laidlaw*.

Such a reading of *Gibbs* would have remarkable implications. The doctrines of mootness, ripeness, and political question all originate in Article III's "case" or "controversy" language, no less than standing does. See, *e. g., National Park Hospitality Assn.* v. *Department of Interior*, 538 U. S. 803, 808. Yet if *Gibbs*' "common nucleus" formulation announced a new definition of "case" or "controversy" for all Article III purposes, a federal court would be free to entertain moot or unripe claims, or claims presenting a political question, if they "derived from" the same "operative fact[s]" as another federal claim suffering from none of these defects. Plaintiffs' reading of *Gibbs*, therefore, would amount to a significant revision of the Court's precedent interpreting Article III. With federal courts thus deciding issues they would not otherwise be authorized to decide, the "'tripartite allocation of power'" that Article III is designed to maintain, *Valley Forge, supra*, at 474, would quickly erode, and the Court's emphasis on the standing requirement's role in maintaining this separation would be rendered hollow rhetoric, see *Lewis* v. *Casey*, 518 U. S. 343, 357. Pp. 350–354.

386 F. 3d 738, vacated in part and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, SOUTER, THOMAS, BREYER, and ALITO, JJ., joined. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 354.

*Theodore B. Olson* argued the cause for petitioners in No. 04–1704. With him on the briefs for petitioner DaimlerChrysler Corporation were *Theodore J. Boutrous, Jr.*, *David Debold*, *Matthew D. McGill*, *Charles A. Rothfeld*, *Erika Z. Jones*, and *Miriam R. Nemetz*. *Douglas R. Cole*, State Solicitor of Ohio, argued the cause for petitioners in No. 04–1724. With him on the briefs were *Jim Petro*, Attorney General, *Stephen P. Carney*, Senior Deputy Solicitor, *Erik J. Clark*, Deputy Solicitor, *Sharon A. Jennings* and *Robert C. Maier*, Assistant Attorneys General, *Samuel J. Nugent*, *Adam W. Loukx*, and *Lisa E. Pizza*.

*Peter D. Enrich* argued the cause for respondents in both cases. With him on the brief were *Alan Morrison* and *Terry J. Lodge*.†

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†Briefs of *amici curiae* urging reversal in both cases were filed for Wayne County, Michigan, by *Edward M. Thomas* and *Melvin Butch Hollowell;* for Elyria, Ohio, et al. by *Eric H. Zagrans;* for AlphaGenics, Inc., et al. by *Frederick A. Provorny;* for the Ashbrook Center for Public Affairs by *Douglas G. Smith;* for the Chamber of Commerce of the United States of America et al. by *Charles A. Trost, Michael G. Stewart, Robin S. Conrad,* and *Amar D. Sarwal;* for the Council on State Taxation et al. by *Douglas L. Lindholm, Stephen P. B. Kranz, William D. Peltz, Jan S. Amundson,* and *Quentin Riegel;* for Ford Motor Co. et al. by *Jerome B. Libin, Kent L. Jones, Kendall L. Houghton, Jeffrey A. Friedman, David G. Leitch,* and *Thomas A. Gottschalk;* for Nissan North America, Inc., by *H. Christopher Bartolomucci* and *Messrs. Trost* and *Stewart;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *David Price.*

Briefs of *amici curiae* urging reversal in No. 04–1704 were filed for the City of New York by *Michael A. Cardozo* and *Leonard J. Koerner;* for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al. by *Daniel W. Sherrick;* for the Pacific Legal Foundation by *Anthony T. Caso;* for the Right Place, Inc., et al. by *John J. Bursch;* and for the Tax Executives Institute, Inc., by *Eli J. Dicker* and *Gregory S. Matson.*

Briefs of *amici curiae* urging reversal in No. 04–1724 were filed for the State of Florida et al. by *Charles J. Crist, Jr.*, Attorney General of Florida, *Christopher M. Kise*, Solicitor General, and *Erik M. Figlio*, Deputy Solicitor General, and by the Attorneys General for their respective jurisdic-

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Jeeps were first mass-produced in 1941 for the U. S. Army by the Willys-Overland Motor Company in Toledo, Ohio. Nearly 60 years later, the city of Toledo and State of Ohio sought to encourage the current manufacturer of Jeeps—DaimlerChrysler—to expand its Jeep operation in Toledo, by offering local and state tax benefits for new investment.

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tions as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *Bill Lockyer* of California, *John Suthers* of Colorado, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Thurbert E. Baker* of Georgia, *Douglas B. Moylan* of Guam, *Mark J. Bennett* of Hawaii, *Lawrence Wasden* of Idaho, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Tom Miller* of Iowa, *Gregory D. Stumbo* of Kentucky, *Steve Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Thomas Reilly* of Massachusetts, *Michael A. Cox* of Michigan, *Jeremiah W. (Jay) Nixon* of Missouri, *Jon Bruning* of Nebraska, *George J. Chanos* of Nevada, *Eliot Spitzer* of New York, *Wayne Stenehjem* of North Dakota, *Pamela Brown* of the Northern Mariana Islands, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Tom Corbett* of Pennsylvania, *Roberto J. Sanchez-Ramos* of Puerto Rico, *Henry McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Paul Summers* of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Rob McKenna* of Washington, and *Peggy A. Lautenschlager* of Wisconsin; and for the National Governors Association et al. by *Richard Ruda* and *James I. Crowley*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the Fiscal Policy Institute et al. by *Richard D. Pomp* and *Robert D. Plattner;* and for Randy Albelda et al. by *Scott L. Cummings*.

*Henry M. Banta* and *Martin Lobel* filed a brief for the Center on Budget and Policy Priorities as *amicus curiae* urging affirmance in No. 04–1704.

*Robert F. Orr* and *Jeanette Doran Brooks* filed a brief for the North Carolina Institute for Constitutional Law as *amicus curiae* urging affirmance in No. 04–1724.

Briefs of *amici curiae* were filed in both cases for DIRECTV, Inc., et al. by *Betty Jo Christian, Mark F. Horning,* and *Lincoln L. Davies;* and for the Tax Foundation by *Kyle O. Sollie* and *Nory Miller*.

*Frederick R. Damm* filed a brief for the Michigan Manufacturers Association as *amicus curiae* in No. 04–1704.

Taxpayers in Toledo sued, alleging that their local and state tax burdens were increased by the tax breaks for DaimlerChrysler, tax breaks that they asserted violated the Commerce Clause. The Court of Appeals agreed that a state tax credit offered under Ohio law violated the Commerce Clause, and state and local officials and DaimlerChrysler sought review in this Court. We are obligated before reaching this Commerce Clause question to determine whether the taxpayers who objected to the credit have standing to press their complaint in federal court. We conclude that they do not, and we therefore can proceed no further.

## I

Ohio levies a franchise tax "upon corporations for the privilege of doing business in the state, owning or using a part or all of its capital or property in [the] state, or holding a certificate of compliance authorizing it to do business in [the] state." *Wesnovtek Corp.* v. *Wilkins*, 105 Ohio St. 3d 312, 313, 2005–Ohio–1826, ¶ 2, 825 N. E. 2d 1099, 1100; see Ohio Rev. Code Ann. § 5733.01 (Lexis 2005). A taxpayer that purchases "new manufacturing machinery and equipment" and installs it at sites in the State receives a credit against the franchise tax. See § 5733.33(B)(1) (Lexis 1999).[1] Municipalities in Ohio may also offer partial property tax waivers to businesses that agree to invest in qualifying areas. See § 5709.62(C)(1)(a) (Lexis 2005). With consent from local school districts, the partial property tax waiver can be increased to a complete exemption. See § 5709.62(D)(1).

In 1998, DaimlerChrysler entered into a contract with the city of Toledo. Under the contract, DaimlerChrysler agreed to expand its Jeep assembly plant at Stickney Avenue in

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[1] Ohio has begun phasing out the franchise tax and has discontinued offering new credits against the tax like the one DaimlerChrysler received. See §§ 5733.01(G), 5733.33(B)(1) (Lexis 2005). Where relevant, therefore, the citations in this opinion are to the statutes in effect at the time DaimlerChrysler made its investment.

Toledo. In exchange, the city agreed to waive the property tax for the plant, with the consent of the two school districts in which the plant is located. Because DaimlerChrysler undertook to purchase and install "new manufacturing machinery and equipment," it was also entitled to a credit against the state franchise tax. See § 5733.33(B)(1) (Lexis 1999).

Plaintiffs filed suit against various state and local officials and DaimlerChrysler in state court, alleging that these tax benefits violated the Commerce Clause. Most of the plaintiffs were residents of Toledo, who paid taxes to both the city of Toledo and State of Ohio. They claimed that they were injured because the tax breaks for DaimlerChrysler diminished the funds available to the city and State, imposing a "disproportionate burden" on plaintiffs. App. 18a, 23a, 28a.[2]

Defendants removed the action to the United States District Court for the Northern District of Ohio. See 28 U. S. C. § 1441. Plaintiffs filed motions to remand the case to state court. See § 1447(c). One of the grounds on which they sought remand concerned their standing. They professed "substantial doubts about their ability to satisfy either the constitutional or the prudential limitations on standing in the federal court," and urged the District Court to avoid the issue entirely by remanding. Plaintiffs' Supplemental Motion for Remand to State Court in No. 3:00cv7247, p. 13, Record, Doc. 17 (footnote omitted).

The District Court declined to remand the case, concluding that, "[a]t the bare minimum, the Plaintiffs who are taxpayers have standing to object to the property tax exemption and franchise tax credit statutes under the 'municipal taxpayer standing' rule articulated in *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923)." App. 78a (citations omitted). On the merits, the District Court found that neither tax benefit violated the Commerce Clause. See 154 F. Supp. 2d 1196 (2001). The Court of Appeals for the Sixth Circuit agreed with the District Court as to the municipal property tax exemption, but held that the state franchise tax credit violated the Commerce Clause. See 386 F. 3d 738 (2004). The Court of Appeals did not address the issue of standing.

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[2] Other plaintiffs were residents of Toledo who claimed they were injured because they were displaced by the DaimlerChrysler expansion and Michigan residents who claimed injury because DaimlerChrysler would have expanded its operations in Michigan but for the Ohio investment tax credit. Plaintiffs neither identified these allegations as a basis for standing in their merits brief before this Court nor referred to them at oral argument. Any argument based on these allegations is therefore abandoned. See, *e. g.*, *United States* v. *International Business Machines Corp.*, 517 U. S. 843, 855, and n. 3 (1996).

Defendants sought certiorari to review the Sixth Circuit's invalidation of the franchise tax credit and plaintiffs sought certiorari to review the upholding of the property tax exemption. We granted certiorari to consider whether the franchise tax credit violates the Commerce Clause, 545 U. S. 1165 (2005); the Michigan Supreme Court had decided a similar question contrary to the Sixth Circuit's analysis here. See *Caterpillar, Inc.* v. *Department of Treasury*, 440 Mich. 400, 488 N. W. 2d 182 (1992). We also asked the parties to address whether plaintiffs have standing to challenge the franchise tax credit in this litigation.

## II

We have "an obligation to assure ourselves" of litigants' standing under Article III. *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 180 (2000). We therefore begin by addressing plaintiffs' claims that they have standing as taxpayers to challenge the franchise tax credit.

### A

Chief Justice Marshall, in *Marbury* v. *Madison*, 1 Cranch 137 (1803), grounded the Federal Judiciary's authority to exercise judicial review and interpret the Constitution on the necessity to do so in the course of carrying out the judicial function of deciding cases. As Marshall explained, "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule." *Id.*, at 177. Determining that a matter before the federal courts is a proper case or controversy under Article III therefore assumes particular importance in ensuring that the Federal Judiciary respects "'the proper—and properly limited—role of the courts in a democratic society,'" *Allen* v. *Wright*, 468 U. S. 737, 750 (1984) (quoting *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975)). If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.

This Court has recognized that the case-or-controversy limitation is crucial in maintaining the "'tripartite allocation of power'" set forth in the Constitution. *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 474 (1982) (quoting *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968)). Marshall again made the point early on, this time in a speech in the House of Representatives. "A case in law or equity," Marshall remarked,

> "was a term . . . of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every *question* under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary." 4 Papers of John Marshall 95 (C. Cullen ed. 1984).

As this Court has explained, "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Raines* v. *Byrd*, 521 U. S. 811, 818 (1997) (quoting *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 37 (1976)).

The case-or-controversy requirement thus plays a critical role, and "Article III standing . . . enforces the Constitution's case-or-controversy requirement." *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 11 (2004). The "core component" of the requirement that a litigant have standing to invoke the authority of a federal court "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992). The requisite elements of this "core component derived directly from the Constitution" are familiar: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen, supra,* at 751. We have been asked to decide an important question of constitutional law concerning the Commerce Clause. But before we do so, we must find that the question is presented in a "case" or "controversy" that is, in James Madison's words, "of a Judiciary Nature." 2 Records of the Federal Convention of 1787, p. 430 (M. Farrand ed. 1966). That requires plaintiffs, as the parties now asserting federal jurisdiction, to carry the burden of establishing their standing under Article III.[3]

### B

Plaintiffs principally claim standing by virtue of their status as Ohio taxpayers, alleging that the franchise tax credit

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[3] Because defendants removed the case from state court to District Court, plaintiffs were not initially the parties that invoked federal jurisdiction. Indeed, plaintiffs initially expressed doubts as to their standing. Nonetheless, because "[w]e presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record," *Renne* v. *Geary*, 501 U. S. 312, 316 (1991) (internal quotation marks omitted), the party asserting federal jurisdiction when it is challenged has the burden of establishing it. Whatever the parties' previous positions on the propriety of a federal forum, plaintiffs, as the parties seeking to establish federal jurisdiction, must make the showings required for standing.

"depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments" and thus "diminish[es] the total funds available for lawful uses and impos[es] disproportionate burdens on" them. App. 28a; see also Brief for Respondents 24. On several occasions, this Court has denied *federal* taxpayers standing under Article III to object to a particular expenditure of federal funds simply because they are taxpayers. Thus the alleged "deprivation of the fair and constitutional use of [a federal taxpayer's] tax dollar" cannot support a challenge to the conveyance of Government land to a private religious college, *Valley Forge*, *supra*, at 476, 482 (internal quotation marks and some brackets omitted), and "the interest of a taxpayer in the moneys of the federal treasury furnishes no basis" to argue that a federal agency's loan practices are unconstitutional, *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 478 (1938); see also *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208 (1974); *United States* v. *Richardson*, 418 U. S. 166 (1974).

The animating principle behind these cases was announced in their progenitor, *Frothingham* v. *Mellon*, decided with *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923). In rejecting a claim that improper federal appropriations would "increase the burden of future taxation and thereby take [the plaintiff's] property without due process of law," the Court observed that a federal taxpayer's

> "interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." *Id.*, at 486, 487.

This logic is equally applicable to taxpayer challenges to expenditures that deplete the treasury, and to taxpayer challenges to so-called "tax expenditures," which reduce amounts available to the treasury by granting tax credits or exemptions. In either case, the alleged injury is based on the asserted effect of the allegedly illegal activity on public revenues, to which the taxpayer contributes.

Standing has been rejected in such cases because the alleged injury is not "concrete and particularized," *Defenders of Wildlife, supra,* at 560, but instead a grievance the taxpayer "suffers in some indefinite way in common with people generally," *Frothingham, supra,* at 488. In addition, the injury is not "actual or imminent," but instead "conjectural or hypothetical." *Defenders of Wildlife, supra,* at 560 (internal quotation marks omitted). As an initial matter, it is unclear that tax breaks of the sort at issue here do in fact deplete the treasury: The very point of the tax benefits is to spur economic activity, which in turn *increases* government revenues. In this very action, the Michigan plaintiffs claimed that they were injured because they lost out on the added revenues that would have accompanied DaimlerChrysler's decision to expand facilities in Michigan. See n. 2, *supra.*

Plaintiffs' alleged injury is also "conjectural or hypothetical" in that it depends on how legislators respond to a reduction in revenue, if that is the consequence of the credit. Establishing injury requires speculating that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit; establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions. Neither sort of speculation suffices to support standing. See *ASARCO Inc.* v. *Kadish,* 490 U. S. 605, 614 (1989) (opinion of KENNEDY, J.) ("[I]t is pure speculation whether the lawsuit would result in any actual tax relief for respondents"); *Warth,* 422 U. S., at 509 (criticizing a taxpayer standing claim for the "conjectural nature of the asserted injury").

A taxpayer plaintiff has no right to insist that the government dispose of any increased revenue it might experience as a result of his suit by decreasing his tax liability or bolstering programs that benefit him. To the contrary, the decision of how to allocate any such savings is the very epitome of a policy judgment committed to the "broad and legitimate discretion" of lawmakers, which "the courts cannot presume either to control or to predict." *ASARCO, supra,* at 615 (opinion of KENNEDY, J.). Under such circumstances, we have no assurance that the asserted injury is "imminent"—that it is "certainly impending." *Whitmore* v. *Arkansas,* 495 U. S. 149, 158 (1990) (internal quotation marks omitted); see *Defenders of Wildlife,* 504 U. S., at 564–565, n. 2.

The foregoing rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers. We indicated as much in *Doremus* v. *Board of Ed. of Hawthorne,* 342 U. S. 429 (1952). In that case, we noted our earlier holdings that "the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect" to support standing to challenge "their manner of expenditure." *Id.,* at 433. We then "reiterate[d]" what we had said in rejecting a federal taxpayer challenge to a federal statute "as equally true when a state Act is assailed: 'The [taxpayer] must be able to show . . . that he has sustained . . . some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally.'" *Id.,* at 433–434 (quoting *Frothingham, supra,* at 488); see *ASARCO, supra,* at 613–614 (opinion of KENNEDY, J.) ("[W]e have likened state taxpayers to federal taxpayers" for purposes of taxpayer standing (citing *Doremus, supra,* at 434)).

The allegations of injury that plaintiffs make in their complaint furnish no better basis for finding standing than those made in the cases where federal taxpayer standing was denied. Plaintiffs claim that DaimlerChrysler's tax credit depletes the Ohio fisc and "impos[es] disproportionate burdens on [them]." App. 28a. This is no different from similar claims by federal taxpayers we have already rejected under

Article III as insufficient to establish standing. See, *e. g., Frothingham,* 262 U. S., at 486 (allegation of injury that the effect of government spending "will be to increase the burden of future taxation and thereby take [plaintiff's] property without due process of law").

State policymakers, no less than their federal counterparts, retain broad discretion to make "policy decisions" concerning state spending "in different ways . . . depending on their perceptions of wise state fiscal policy and myriad other circumstances." *ASARCO, supra,* at 615 (opinion of KENNEDY, J.). Federal courts may not assume a particular exercise of this state fiscal discretion in establishing standing; a party seeking federal jurisdiction cannot rely on such "[s]peculative inferences . . . to connect [his] injury to the challenged actions of [the defendant]," *Simon,* 426 U. S., at 45; see also *Allen,* 468 U. S., at 759. Indeed, because state budgets frequently contain an array of tax and spending provisions, any number of which may be challenged on a variety of bases, affording state taxpayers standing to press such challenges simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as "'virtually continuing monitors of the wisdom and soundness'" of state fiscal administration, contrary to the more modest role Article III envisions for federal courts. See *id.,* at 760–761 (quoting *Laird* v. *Tatum,* 408 U. S. 1, 15 (1972)).

For the foregoing reasons, we hold that state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers.[4]

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[4] The majority of the Courts of Appeals to have considered the issue have reached a similar conclusion. See, *e. g., Booth* v. *Hvass,* 302 F. 3d 849 (CA8 2002); *Board of Ed. of Mt. Sinai Union Free School Dist.* v. *New York State Teachers Retirement System,* 60 F. 3d 106 (CA2 1995); *Colorado Taxpayers Union, Inc.* v. *Romer,* 963 F. 2d 1394 (CA10 1992); *Taub* v. *Kentucky,* 842 F. 2d 912 (CA6 1988); *Korioth* v. *Briscoe,* 523 F. 2d 1271

### C

Plaintiffs argue that an exception to the general prohibition on taxpayer standing should exist for Commerce Clause challenges to state tax or spending decisions, analogizing their Commerce Clause claim to the Establishment Clause challenge we permitted in *Flast* v. *Cohen,* 392 U. S. 83. *Flast* held that because "the Establishment Clause . . . specifically limit[s] the taxing and spending power conferred by Art. I, § 8," "a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of" the Establishment Clause. *Id.*, at 105–106. *Flast* held out the possibility that "other specific [constitutional] limitations" on Article I, § 8, might surmount the "barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers." 392 U. S., at 105, 85. But as plaintiffs candidly concede, "only the Establishment Clause" has supported federal taxpayer suits since *Flast.* Brief for Respondents 12; see *Bowen* v. *Kendrick,* 487 U. S. 589, 618 (1988) ("Although we have considered the problem of standing and Article III limitations on federal jurisdiction many times since *[Flast],* we have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing").

Quite apart from whether the franchise tax credit is analogous to an exercise of congressional power under Article I, § 8, plaintiffs' reliance on *Flast* is misguided: Whatever rights plaintiffs have under the Commerce Clause, they are fundamentally unlike the right not to " 'contribute three pence . . . for the support of any one [religious] establishment.' " 392

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(CA5 1975); but cf. *Arakaki* v. *Lingle,* 423 F. 3d 954, 967–969 (CA9 2005) (finding state taxpayer standing in light of *Hoohuli* v. *Ariyoshi,* 741 F. 2d 1169 (CA9 1984), but noting that JUSTICE KENNEDY's opinion in *ASARCO Inc.* v. *Kadish,* 490 U. S. 605 (1989), would "carry persuasive value" absent *Hoohuli*).

U. S., at 103 (quoting 2 Writings of James Madison 186 (G. Hunt ed. 1901)). Indeed, plaintiffs compare the Establishment Clause to the Commerce Clause at such a high level of generality that almost any constitutional constraint on government power would "specifically limit" a State's taxing and spending power for *Flast* purposes. 392 U. S., at 105; see Brief for Respondents 14 ("In each case, the harm to be avoided by [the two Clauses] is the loss of governmental neutrality"). And even if the two Clauses are similar in that they often implicate governments' fiscal decisions, see *id.*, at 13–14, a finding that the Commerce Clause satisfies the *Flast* test would leave no principled way of distinguishing those other constitutional provisions that we have recognized constrain governments' taxing and spending decisions, see, *e. g.*, *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221 (1987) (invalidating state sales tax under the Free Press Clause). Yet such a broad application of *Flast*'s exception to the general prohibition on taxpayer standing would be quite at odds with its narrow application in our precedent and *Flast*'s own promise that it would not transform federal courts into forums for taxpayers' "generalized grievances." 392 U. S., at 106.

*Flast* is consistent with the principle, underlying the Article III prohibition on taxpayer suits, that a litigant may not assume a particular disposition of government funds in establishing standing. The *Flast* Court discerned in the history of the Establishment Clause "the specific evils feared by [its drafters] that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Id.*, at 103. The Court therefore understood the "injury" alleged in Establishment Clause challenges to federal spending to be the very "extract[ion] and spen[ding]" of "tax money" in aid of religion alleged by a plaintiff. *Id.*, at 106. And an injunction against the spending would of course redress *that* injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally. See *Valley Forge,* 454 U. S., at 514 (STEVENS, J., dissenting) ("[T]he plaintiffs' invocation of the Establishment Clause was of decisive importance in resolving the standing issue in *[Flast]*").

Plaintiffs thus do not have state taxpayer standing on the ground that their Commerce Clause challenge is just like the Establishment Clause challenge in *Flast.*

## III

Plaintiffs also claim that their status as *municipal* taxpayers gives them standing to challenge the *state* franchise tax credit at issue here. The *Frothingham* Court noted with approval the standing of municipal residents to enjoin the "illegal use of the moneys of a municipal corporation," relying on "the peculiar relation of the corporate taxpayer to the corporation" to distinguish such a case from the general bar on taxpayer suits. 262 U. S., at 486, 487; see *ASARCO,* 490 U. S., at 613–614 (opinion of KENNEDY, J.) (reiterating distinction). Plaintiffs here challenged the municipal property tax exemption as municipal taxpayers. That challenge was rejected by the Court of Appeals on the merits, and no issue regarding plaintiffs' standing to bring it has been raised. In plaintiffs' challenge to the state franchise tax credit, however, they identify no municipal action contributing to any claimed injury. Instead, they try to leverage the notion of municipal taxpayer standing beyond challenges to municipal action, in two ways.

### A

First, plaintiffs claim that because state law requires revenues from the franchise tax to be distributed to local governments, Ohio Rev. Code Ann. §5733.12 (Lexis 2005), the award of a credit to DaimlerChrysler reduced such distributions and thus depleted the funds of "local governments to which Respondents pay taxes." Brief for Respondents 16. But plaintiffs' challenge is still to the state law and state decision, not those of their municipality. We have already explained why a state taxpayer lacks standing to challenge a state fiscal decision on the grounds that it might affect his tax liability. All plaintiffs have done in recasting their claims as ones brought by municipal taxpayers whose municipalities receive funding from the State—the level of which might be affected by the same state fiscal decision—is introduce yet another level of conjecture to their already hypothetical claim of injury.

And in fact events have highlighted the peril of assuming that any revenue increase resulting from a taxpayer suit will be put to a particular use. Ohio's General Assembly suspended the statutory budget mechanism that distributes franchise tax revenues to local governments in 2001 and again in its subsequent biennial budgets. See Amended Substitute H. B. 94, 124th General Assembly § 140 (2001), available at http://www.legislature.state.oh.us/BillText124/124_HB_94_ENR.pdf (all Internet materials as visited May 12, 2006, and available in Clerk of Court's case file); Amended Substitute H. B. 95, 125th General Assembly § 139 (2003), available at http://www.legislature.state.oh.us/BillText125/125_HB_95_EN2_N.pdf; Amended Substitute H. B. 66, 126th General Assembly § 557.12 (2005), available at http://www.legislature.state.oh.us/BillText126/126_HB_66_EN2d.pdf. Any effect that enjoining DaimlerChrysler's credit will have on municipal funds, therefore, will not result from automatic operation of a statutory formula, but from a hypothesis that the state government will choose to direct the supposed revenue from the restored franchise tax to municipalities. This is precisely the sort of conjecture we may not entertain in assessing standing. See *ASARCO, supra,* at 614 (opinion of KENNEDY, J.).

### B

The second way plaintiffs seek to leverage their standing to challenge the municipal property tax exemption into a challenge to the franchise tax credit is by relying on *Mine Workers* v. *Gibbs,* 383 U. S. 715 (1966). According to plaintiffs, the "supplemental jurisdiction" recognized in that case supports jurisdiction over all their claims, once the District Court determined they had standing to challenge the property tax exemption. Brief for Respondents 17–18.

*Gibbs* held that federal-question jurisdiction over a claim may authorize a federal court to exercise jurisdiction over state-law claims that may be viewed as part of the same case because they "derive from a common nucleus of operative fact" as the federal claim. 383 U. S., at 725. Plaintiffs assume that *Gibbs* stands for the proposition that federal jurisdiction extends to all claims sufficiently related to a claim within Article III to be part of the same case, regardless of the nature of the deficiency that would keep the former claims out of federal court if presented on their own.

Our general approach to the application of *Gibbs,* however, has been markedly more cautious. For example, as a matter of statutory construction of the pertinent jurisdictional provisions, we refused to extend *Gibbs* to allow claims to be asserted against nondiverse parties when jurisdiction was based on diversity, see *Owen Equipment & Erection Co.* v. *Kroger,* 437 U. S. 365 (1978), and we refused to extend *Gibbs* to authorize supplemental jurisdiction over claims that do not satisfy statutory amount-in-controversy requirements, see *Finley* v. *United States,* 490 U. S. 545 (1989). As the Court explained just last Term, "[w]e have not . . . applied *Gibbs'* expansive interpretive approach to other aspects of the jurisdictional statutes." *Exxon Mobil Corp.* v. *Allapattah Services, Inc.,* 545 U. S. 546, 553 (2005) (applying 28 U. S. C. § 1367, enacted in 1990, to allow a federal court in a diversity action to exercise supplemental jurisdiction over additional diverse plaintiffs whose claims failed to meet the amount-in-controversy threshold).

What we have never done is apply the rationale of *Gibbs* to permit a federal court to exercise supplemental jurisdiction over a claim that does not itself satisfy those elements of the Article III inquiry, such as constitutional standing, that "serv[e] to identify those disputes which are appropriately resolved through the judicial process." *Whitmore,* 495 U. S., at 155. We see no reason to read the language of *Gibbs* so broadly, particularly since our standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press. See *Allen,* 468 U. S., at 752 ("[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the *particular claims* asserted" (emphasis added)). We have insisted, for instance, that "a plaintiff must demonstrate standing separately for each form of relief sought." *Laidlaw,* 528 U. S., at 185; see *Los Angeles* v. *Lyons,* 461 U. S. 95, 109 (1983). But if standing were commutative, as plaintiffs claim, this insistence would make little sense when all claims for relief derive from a "common nucleus of operative fact," as they certainly appear to have in both *Laidlaw, supra,* at 175–179, and *Lyons, supra,* at 97–98.

Plaintiffs' reading of *Gibbs* to allow standing as to one claim to suffice for all claims arising from the same "nucleus of operative fact" would have remarkable implications. The doctrines of mootness, ripeness, and political question all originate in Article III's "case" or "controversy" language, no less than standing does. See, *e. g., National Park Hospitality Assn.* v. *Department of Interior,* 538 U. S. 803, 808 (2003) (ripeness); *Arizonans for Official English* v. *Arizona,* 520 U. S. 43, 67 (1997) (mootness); *Reservists Comm. to Stop the War,* 418 U. S., at 215 (political question). Yet if *Gibbs*' "common nucleus" formulation announced a new definition of "case" or "controversy" for all Article III purposes, a federal court would be free to entertain moot or unripe claims, or claims presenting a political question, if they "derived from" the same "operative fact[s]" as another federal claim suffering from none of these defects. Plaintiffs' reading of *Gibbs,* therefore, would amount to a significant revision of our precedent interpreting Article III. With federal courts thus deciding issues they would not otherwise be authorized to decide, the "'tripartite allocation of power'" that Article III is designed to maintain, *Valley Forge,* 454 U. S., at 474, would quickly erode; our emphasis on the standing requirement's role in maintaining this separation would be rendered hollow rhetoric. As we have explained, "[t]he actual-injury requirement would hardly serve the purpose . . . of preventing courts from undertaking tasks assigned to the political branches[,] if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration." *Lewis* v. *Casey,* 518 U. S. 343, 357 (1996).

*Lewis* emphasized that "[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Ibid.* Plaintiffs' theory of ancillary standing would contravene this principle. Plaintiffs failed to establish Article III injury with respect to their *state* taxes, and even if they did do so with respect to their *municipal* taxes, that injury does not entitle them to seek a remedy as to the state taxes. As the Court summed up the point in *Lewis,* "standing is not dispensed in gross." *Id.,* at 358, n. 6.[5]

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[5] In defending the contrary position, plaintiffs rely on three cases from the Courts of Appeals. But two of those cases hold only that, once a litigant has standing to request invalidation of a particular agency action, it may do so by identifying all grounds on which the agency may have "'failed to comply with its statutory mandate.'" *Sierra Club* v. *Adams,* 578 F. 2d 389, 392 (CADC 1978) (quoting *Sierra Club* v. *Morton,* 405 U. S. 727, 737 (1972)); see also *Iowa Independent Bankers* v. *Board of Governors of Fed. Reserve,* 511 F. 2d 1288, 1293–1294 (CADC 1975). They do not establish that the litigant can, by virtue of his standing to challenge one government action, challenge other governmental actions that did not injure him. In the third case, the Court of Appeals relied substantially

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All the theories plaintiffs have offered to support their standing to challenge the franchise tax credit are unavailing. Because plaintiffs have no standing to challenge that credit, the lower courts erred by considering their claims against it on the merits. The judgment of the Sixth Circuit is therefore vacated in part, and the cases are remanded for dismissal of plaintiffs' challenge to the franchise tax credit.

*It is so ordered.*

JUSTICE GINSBURG, concurring in part and concurring in the judgment.

Today's decision, the Court rightly points out, is solidly grounded in longstanding precedent, *Frothingham* v. *Mellon,* decided with *Massachusetts* v. *Mellon,* 262 U. S. 447 (1923), and *Doremus* v. *Board of Ed. of Hawthorne,* 342 U. S. 429 (1952), decisions that antedate current jurisprudence on standing to sue. See *ante,* at 343, 345. *Frothingham* held nonjusticiable a federal taxpayer's suit challenging a federal-spending program. See 262 U. S., at 487 (describing taxpayer's interest as "minute and indeterminable"). *Doremus* applied *Frothingham*'s reasoning to a state taxpayer's suit. 342 U. S., at 434. These decisions exclude from federal-court cognizance claims, not delineated by Congress, presenting generalized grievances. An exception to *Frothingham*'s rule, recognized post-*Doremus* in *Flast* v. *Cohen,* 392 U. S. 83 (1968), covers certain alleged violations of the Establishment Clause. The *Flast* exception has not been extended to other areas. See *Bowen* v. *Kendrick,* 487 U. S.

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on the fact that "all courts possess an inherent power to prevent unprofessional conduct by those attorneys who are practicing before them" in allowing the Government to contest the division of a damages award it was ordered to pay between a plaintiff and his attorney. *Jackson* v. *United States,* 881 F. 2d 707, 710, 711 (CA9 1989). That situation is rather far afield from the question before us.

589, 618 (1988); cf. Enrich, Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business, 110 Harv. L. Rev. 377, 417–418 (1996).

One can accept, as I do, the nonjusticiability of *Frothingham*-type federal and state taxpayer suits in federal court without endorsing as well the limitations on standing later declared in *Simon* v. *Eastern Ky. Welfare Rights Organization,* 426 U. S. 26 (1976) *(EKWRO); Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.,* 454 U. S. 464 (1982); *Allen* v. *Wright,* 468 U. S. 737 (1984); and *Lujan* v. *Defenders of Wildlife,* 504 U. S. 555 (1992). See *EKWRO,* 426 U. S., at 54–66 (Brennan, J., concurring in judgment); *Valley Forge,* 454 U. S., at 513–515 (STEVENS, J., dissenting); *Allen,* 468 U. S., at 783–795 (same), and the overturned Court of Appeals opinion, *Wright* v. *Regan,* 656 F. 2d 820, 828–832 (CADC 1981) (Ginsburg, J.); *Defenders of Wildlife,* 504 U. S., at 582–585 (STEVENS, J., concurring in judgment); Sunstein, What's Standing after *Lujan?* Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 203–205, 228–229 (1992) (contrasting *Lujan, Allen,* and *EKWRO* with *Regents of Univ. of Cal.* v. *Bakke,* 438 U. S. 265 (1978)); Fletcher, The Structure of Standing, 98 Yale L. J. 221, 267–270 (1988) (commenting on *Flast* and *Valley Forge*). Noting this large reservation, I concur in the judgment, and in the balance of the Court's opinion.

# SEREBOFF ET UX. *v.* MID ATLANTIC MEDICAL SERVICES, INC.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 05–260. Argued March 28, 2006—Decided May 15, 2006

Petitioner Sereboffs are beneficiaries under a health insurance plan administered by respondent Mid Atlantic and covered by the Employee Retirement Income Security Act of 1974 (ERISA). The plan provides for payment of covered medical expenses and has an "Acts of Third Parties" provision. This provision requires a beneficiary who is injured as a result of an act or omission of a third party to reimburse Mid Atlantic for benefits it pays on account of those injuries, if the beneficiary recovers for those injuries from the third party. The Sereboffs were involved in an automobile accident and suffered injuries. The plan paid the couple's medical expenses. The Sereboffs sought compensatory damages for the accident from third parties in state court. After the Sereboffs settled their tort suit, Mid Atlantic filed suit in District Court under § 502(a)(3) of ERISA, seeking to collect from the Sereboffs' tort recovery the medical expenses it had paid on the Sereboffs' behalf. The Sereboffs agreed to set aside from their tort recovery a sum equal to the amount Mid Atlantic claimed, and preserve this sum in an investment account pending the outcome of the suit. The court found in Mid Atlantic's favor and ordered the Sereboffs to turn over the amount set aside. The Fourth Circuit affirmed in relevant part, and observed that the Courts of Appeals are divided on the question whether § 502(a)(3) authorizes recovery in these circumstances. This Court granted review to resolve this disagreement.

*Held:* Mid Atlantic's action properly sought "equitable relief" under § 502(a)(3). Pp. 361–369.

(a) A fiduciary may bring a civil action under § 502(a)(3)(B) "to obtain . . . appropriate equitable relief . . . to enforce . . . the terms of the plan." The only question here is whether the relief requested was "equitable." In *Mertens* v. *Hewitt Associates*, 508 U. S. 248, this Court construed § 502(a)(3)(B) to authorize only "those categories of relief that were *typically* available in equity," and thus rejected a claim that this Court found sought "nothing other than compensatory *damages.*" *Id.*, at 256, 255. This Court elaborated on this construction of § 502(a)(3) in *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204, which involved a provision in an ERISA plan similar to the "Acts of Third

Parties" provision in the Sereboffs' plan. Relying on such a provision, Great-West sought equitable restitution of benefits it had paid when Knudson recovered in tort from a third party. In considering whether § 502(a)(3)(B) authorized such relief, this Court asked whether the restitutionary remedy Great-West sought would have been equitable in "the days of the divided bench," *id.*, at 212. This Court found that it would not have been equitable, because the funds Great-West sought were not in Knudson's possession but had been placed in a trust under California law. That impediment is not present here. Mid Atlantic sought identifiable funds within the Sereboffs' possession and control—that part of the tort settlement due Mid Atlantic under the ERISA plan and set aside in the investment account. Pp. 361–363.

(b) This Court's case law from the days of the divided bench confirms that Mid Atlantic's claim is equitable. In *Barnes* v. *Alexander*, 232 U. S. 117, attorney Barnes promised two other attorneys "one-third of the contingent fee" he expected in a case, *id.*, at 119. Based on "the familiar rul[e] of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing," *id.*, at 121, the Court found that Barnes' undertaking "create[d] a lien" upon the portion of the recovery due him from the client, *ibid.*, which the other attorneys could "follow . . . into [Barnes'] hands" "as soon as [the fund] was identified," *id.*, at 123. The "Acts of Third Parties" provision in the Sereboffs' plan, like Barnes' promise, specifically identified a particular fund distinct from the Sereboffs' general assets, and a particular share of that fund to which Mid Atlantic was entitled. Thus, Mid Atlantic could rely on a "familiar rul[e] of equity" to collect for the medical bills it had paid by following a portion of the recovery "into the [Sereboffs'] hands" "as soon as [the settlement fund] was identified," and imposing on that portion a constructive trust or equitable lien. *Ibid.*

The Sereboffs object that Mid Atlantic's suit would not have satisfied the strict tracing rules that they say accompanied equitable restitution at common law. But *Barnes* confirms that no such tracing requirement applies to equitable liens imposed by agreement or assignment, like that in *Barnes* itself. And *Knudson* did not endorse application of all restitutionary conditions, like the tracing rules the Sereboffs identify, to every action for an equitable lien under § 502(a)(3). *Knudson* simply held that equitable restitution was unavailable because the funds Great-West sought were not in Knudson's possession.

The Sereboffs also argue that equitable relief is inappropriate, even under *Barnes*, because at the time they agreed to the plan terms, no fund existed in which they could grant Mid Atlantic an equitable interest. But *Barnes* explicitly disapproved of a rule requiring identification at the time a contract is made of the fund to which a lien specified in the contract attached.

The Sereboffs also claim that the rule announced in *Barnes* applies only to equitable liens claimed under an attorney's contingency fee arrangement. But *Barnes* did not attach any particular significance to the identity of the parties seeking recovery, and other cases of this Court, not involving attorney's contingency fees, have applied the same "familiar rul[e] of equity" that *Barnes* did. See, *e. g., Walker* v. *Brown*, 165 U. S. 654. Pp. 363–368.

(c) The Sereboffs' contention that the lower courts erred in allowing enforcement of the "Acts of Third Parties" provision, without imposing limitations that would apply to an equitable subrogation action, is rejected. Mid Atlantic's claim is not considered equitable because it is a subrogation claim. Rather, it is considered equitable because it is indistinguishable from an action to enforce an equitable lien established by agreement, of the sort epitomized by *Barnes*. P. 368.

407 F. 3d 212, affirmed in relevant part.

ROBERTS, C. J., delivered the opinion for a unanimous Court.

*Peter K. Stris* argued the cause for petitioners. With him on the briefs were *Radha A. Pathak, John C. Stein, Shaun P. Martin, William Delgado,* and *Jason H. Wilson.*

*Gregory S. Coleman* argued the cause for respondent. With him on the brief were *Thomas F. Fitzgerald* and *William F. Hanrahan.*

*James A. Feldman* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Clement, Deputy Solicitor General Kneedler, Howard M. Radzely, Nathaniel I. Spiller,* and *Edward D. Sieger.**

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**Jeffrey Robert White* and *Kenneth M. Suggs* filed a brief for the Association of Trial Lawyers of America as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for America's Health Insurance Plans, Inc., et al. by *Waldemar J. Pflepsen, Jr., Stephanie W. Kanwit, Stephen H. Goldberg, Jan S. Amundson,* and *Quentin Riegel;* for the Blue Cross Blue Shield Association by *Anthony F. Shelley, Alan I. Horowitz,* and *Laura G. Ferguson;* for the Central States, Southeast and Southwest Areas Health and Welfare Fund by *William J. Nellis, Thomas C. Nyhan,* and *James P. Condon;* for the National Association of Subroga-

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In this case we consider again the circumstances in which a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) may sue a beneficiary for reimbursement of medical expenses paid by the ERISA plan, when the beneficiary has recovered for its injuries from a third party.

## I

Marlene Sereboff's employer sponsors a health insurance plan administered by respondent Mid Atlantic Medical Services, Inc., and covered by ERISA, 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.* (2000 ed. and Supp. III). Marlene Sereboff and her husband Joel are beneficiaries under the plan. The plan provides for payment of certain covered medical expenses and contains an "Acts of Third Parties" provision. This provision "applies when [a beneficiary is] sick or injured as a result of the act or omission of another person or party," and requires a beneficiary who "receives benefits" under the plan for such injuries to "reimburse [Mid Atlantic]" for those benefits from "[a]ll recoveries from a third party (whether by lawsuit, settlement, or otherwise)." App. to Pet. for Cert. 38a. The provision states that "[Mid Atlantic's] share of the recovery will not be reduced because [the beneficiary] has not received the full damages claimed, unless [Mid Atlantic] agrees in writing to a reduction." *Ibid.*

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tion Professionals by *John D. Kolb*, *Daran P. Kiefer*, and *Thomas H. Lawrence III;* for the National Coordinating Committee for Multiemployer Plans by *Donald J. Capuano* and *R. Richard Hopp;* for the Southwest Carpenters Health & Welfare Trust by *Desmond C. Lee;* for the Self-Insurance Institute of America, Inc., by *John E. Barry*, *Thomas W. Brunner*, *Lawrence H. Mirel*, *Bryan B. Davenport*, and *George J. Pantos;* and for the Society for Human Resource Management et al. by *Térese M. Connerton*, *Stephen A. Bokat*, *Robin S. Conrad*, and *Ellen Dunham Bryant.*

The Sereboffs were involved in an automobile accident in California and suffered injuries. Pursuant to the plan's coverage provisions, the plan paid the couple's medical expenses. The Sereboffs filed a tort action in state court against several third parties, seeking compensatory damages for injuries suffered as a result of the accident. Soon after the suit was commenced, Mid Atlantic sent the Sereboffs' attorney a letter asserting a lien on the anticipated proceeds from the suit, for the medical expenses Mid Atlantic paid on the Sereboffs' behalf. App. 87–90. On several occasions over the next two years, Mid Atlantic sent similar correspondence to the attorney and to the Sereboffs, repeating its claim to a lien on a portion of the Sereboffs' recovery, and detailing the medical expenses as they accrued and were paid by the plan.

The Sereboffs' tort suit eventually settled for $750,000. Neither the Sereboffs nor their attorney sent any money to Mid Atlantic in satisfaction of its claimed lien which, after Mid Atlantic completed its payments on the Sereboffs' behalf, totaled $74,869.37.

Mid Atlantic filed suit in District Court under § 502(a)(3) of ERISA, 29 U. S. C. § 1132(a)(3), seeking to collect from the Sereboffs the medical expenses it had paid on their behalf. Since the Sereboffs' attorney had already distributed the settlement proceeds to them, Mid Atlantic sought a temporary restraining order and preliminary injunction requiring the couple to retain and set aside at least $74,869.37 from the proceeds. The District Court approved a stipulation by the parties, under which the Sereboffs agreed to "preserve $74,869.37 of the settlement funds" in an investment account, "until the [District] Court rules on the merits of this case and all appeals, if any, are exhausted." App. 69.

On the merits, the District Court found in Mid Atlantic's favor and ordered the Sereboffs to pay Mid Atlantic the $74,869.37, plus interest, with a deduction for Mid Atlantic's share of the attorney's fees and court costs the Sereboffs had incurred in state court. See 303 F. Supp. 2d 691, 316

F. Supp. 2d 265 (Md. 2004). The Sereboffs appealed and the Fourth Circuit affirmed in relevant part. 407 F. 3d 212 (2005). The Fourth Circuit observed that the Courts of Appeals are divided on the question whether § 502(a)(3) authorizes recovery in these circumstances. See *id.*, at 219–220, n. 7.[1] We granted certiorari to resolve the disagreement. 546 U. S. 1030 (2005).

## II

### A

A fiduciary may bring a civil action under § 502(a)(3) of ERISA "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U. S. C. § 1132(a)(3). There is no dispute that Mid Atlantic is a fiduciary under ERISA and that its suit in District Court was to "enforce . . . the terms of" the "Acts of Third Parties" provision in the Sereboffs' plan. The only question is whether the relief Mid Atlantic requested from the District Court was "equitable" under § 502(a)(3)(B).

This is not the first time we have had occasion to clarify the scope of the remedial power conferred on district courts by § 502(a)(3)(B). In *Mertens* v. *Hewitt Associates*, 508 U. S. 248 (1993), we construed the provision to authorize only "those categories of relief that were *typically* available in equity," and thus rejected a claim that we found sought "nothing other than compensatory *damages*." *Id.*, at 256, 255. We elaborated on this construction of § 502(a)(3)(B) in

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[1] Compare *Administrative Comm. of Wal-Mart Assoc. Health & Welfare Plan* v. *Willard*, 393 F. 3d 1119 (CA10 2004), *Bombardier Aerospace Employee Welfare Benefits Plan* v. *Ferrer, Poirot & Wansbrough*, 354 F. 3d 348 (CA5 2003), and *Administrative Comm. of Wal-Mart Stores, Inc. Assoc. Health & Welfare Plan* v. *Varco*, 338 F. 3d 680 (CA7 2003), with *Qualchoice, Inc.* v. *Rowland*, 367 F. 3d 638 (CA6 2004), and *Westaff (USA) Inc.* v. *Arce*, 298 F. 3d 1164 (CA9 2002).

*Great-West Life & Annuity Ins. Co.* v. *Knudson,* 534 U. S. 204 (2002), which involved facts similar to those in this case. Much like the "Acts of Third Parties" provision in the Sereboffs' plan, the plan in *Knudson* reserved "'a first lien upon any recovery, whether by settlement, judgment or otherwise,' that the beneficiary receives from [a] third party." *Id.,* at 207. After Knudson was involved in a car accident, Great-West paid medical bills on her behalf and, when she recovered in tort from a third party for her injuries, Great-West sought to collect from her for the medical bills it had paid. *Id.,* at 207–209.

In response to the argument that Great-West's claim in *Knudson* was for "restitution" and thus equitable under § 502(a)(3)(B) and *Mertens,* we noted that "not all relief falling under the rubric of restitution [was] available in equity." 534 U. S., at 212. To decide whether the restitutionary relief sought by Great-West was equitable or legal, we examined cases and secondary legal materials to determine if the relief would have been equitable "[i]n the days of the divided bench." *Ibid.* We explained that one feature of equitable restitution was that it sought to impose a constructive trust or equitable lien on "particular funds or property in the defendant's possession." *Id.,* at 213. That requirement was not met in *Knudson,* because "the funds to which petitioners claim[ed] an entitlement" were not in Knudson's possession, but had instead been placed in a "Special Needs Trust" under California law. *Id.,* at 214, 207. The kind of relief Great-West sought, therefore, was "not equitable—the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that [Great-West] conferred upon [Knudson]." *Id.,* at 214. We accordingly determined that the suit could not proceed under § 502(a)(3). *Ibid.*

That impediment to characterizing the relief in *Knudson* as equitable is not present here. As the Fourth Circuit explained below, in this case Mid Atlantic sought "specifically identifiable" funds that were "within the possession and control of the Sereboffs"—that portion of the tort settlement due Mid Atlantic under the terms of the ERISA plan, set aside and "preserved [in the Sereboffs'] investment accounts." 407 F. 3d, at 218. Unlike Great-West, Mid Atlantic did not simply seek "to impose personal liability . . . for a contractual obligation to pay money." *Knudson*, 534 U. S., at 210. It alleged breach of contract and sought money, to be sure, but it sought its recovery through a constructive trust or equitable lien on a specifically identified fund, not from the Sereboffs' assets generally, as would be the case with a contract action at law. ERISA provides for equitable remedies *to enforce plan terms*, so the fact that the action involves a breach of contract can hardly be enough to prove relief is not equitable; that would make § 502(a)(3)(B)(ii) an empty promise. This Court in *Knudson* did not reject Great-West's suit out of hand because it alleged a breach of contract and sought money, but because Great-West did not seek to recover a particular fund from the defendant. Mid Atlantic does.

## B

While Mid Atlantic's case for characterizing its relief as equitable thus does not falter because of the nature of the recovery it seeks, Mid Atlantic must still establish that the basis for its claim is equitable. See *id.*, at 213 (whether remedy "is legal or equitable depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought"). Our case law from the days of the divided bench confirms that Mid Atlantic's claim is equitable. In *Barnes* v. *Alexander*, 232 U. S. 117 (1914), for instance, attorneys Street and Alexander performed work for Barnes, another attorney, who promised them "one-third of the contingent fee" he expected in the case. *Id.*, at 119. In upholding their equitable claim to this portion of the fee, Justice Holmes recited "the familiar rul[e] of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing." *Id.*, at 121. On the basis of this rule, he concluded that Barnes' undertaking "create[d] a lien" upon the portion of the monetary recovery due Barnes from the client, *ibid.*, which Street and Alexander could "follow . . . into the hands of . . . Barnes," "as soon as [the fund] was identified," *id.*, at 123.

Much like Barnes' promise to Street and Alexander, the "Acts of Third Parties" provision in the Sereboffs' plan specifically identified a particular fund, distinct from the Sereboffs' general assets—"[a]ll recoveries from a third party (whether by lawsuit, settlement, or otherwise)"—and a particular share of that fund to which Mid Atlantic was entitled—"that portion of the total recovery which is due [Mid Atlantic] for benefits paid." App. to Pet. for Cert. 38a. Like Street and Alexander in *Barnes*, therefore, Mid Atlantic could rely on a "familiar rul[e] of equity" to collect for the medical bills it had paid on the Sereboffs' behalf. *Barnes*, *supra*, at 121. This rule allowed them to "follow" a portion of the recovery "into the [Sereboffs'] hands" "as soon as [the settlement fund] was identified," and impose on that portion a constructive trust or equitable lien. 232 U. S., at 123.

The Sereboffs object that Mid Atlantic's suit would not have satisfied the conditions for "equitable restitution" at common law, particularly the "strict tracing rules" that allegedly accompanied this form of relief. Reply Brief for Petitioners 8. When an equitable lien was imposed as restitutionary relief, it was often the case that an asset belonging to the plaintiff had been improperly acquired by the defendant and exchanged by him for other property. A central requirement of equitable relief in these circumstances, the Sereboffs argue, was the plaintiff's ability to "'trac[e]' the asset into its products or substitutes," or "trace his money or property to some particular funds or assets." 1 D. Dobbs, Law of Remedies §4.3(2), pp. 591, n. 10, 592 (2d ed. 1993).

But as the Sereboffs themselves recognize, an equitable lien sought as a matter of restitution, and an equitable lien "by agreement," of the sort at issue in *Barnes,* were different species of relief. See Brief for Petitioners 24–25; Reply Brief for Petitioners 11; see also 1 Dobbs, *supra,* § 4.3(3), at 601; 1 G. Palmer, Law of Restitution § 1.5, p. 20 (1978). *Barnes* confirms that no tracing requirement of the sort asserted by the Sereboffs applies to equitable liens by agreement or assignment: The plaintiffs in *Barnes* could not identify an asset they originally possessed, which was improperly acquired and converted into property the defendant held, yet that did not preclude them from securing an equitable lien. To the extent Mid Atlantic's action is proper under *Barnes,* therefore, its asserted inability to satisfy the "strict tracing rules" for "equitable restitution" is of no consequence. Reply Brief for Petitioners 8.

The Sereboffs concede as much, stating that they "do not contend—and have never suggested—that any tracing was historically required when an equitable lien was imposed *by agreement.*" *Id.,* at 11. Their argument is that such tracing was required when an equitable lien was "predicated on a theory of *equitable restitution.*" *Ibid.* The Sereboffs appear to assume that *Knudson* endorsed application of all the restitutionary conditions—including restitutionary tracing rules—to every action for an equitable lien under § 502(a)(3). This assumption is inaccurate. *Knudson* simply described in general terms the conditions under which a fiduciary might recover when it was seeking equitable restitution under a provision like that at issue in this case. There was no need in *Knudson* to catalog all the circumstances in which equitable liens were available in equity; Great-West claimed a right to recover in restitution, and the Court concluded only that equitable restitution was unavailable because the funds sought were not in Knudson's possession. 534 U. S., at 214.

The Sereboffs argue that, even under *Barnes,* equitable relief would not have been available to fiduciaries relying on plan provisions like the one at issue here, because when the beneficiary agrees to such a provision "no third-party recovery" exists which the beneficiary can "place . . . beyond his control and grant [the fiduciary] a complete and present right therein." Brief for Petitioners 26, 25 (internal quotation marks omitted). It may be true that, in contract cases, equity originally required identification at the time the contract was made of the fund to which a lien specified in the contract attached. See, *e. g., Trist* v. *Child,* 21 Wall. 441, 447 (1875) ("[A] mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund *pro tanto*"). But *Barnes* explicitly disapproved of this rule, observing that *Trist* addressed the issue only in dicta (since the contract containing the lien provision in *Trist* was illegal), and treating the "question as at large," even in light of earlier opinions that had dealt with it head on. *Barnes, supra,* at 120 (citing *Trist, supra; Christmas* v. *Russell,* 14 Wall. 69 (1872); *Wright* v. *Ellison,* 1 Wall. 16 (1864)).

Apart from those cases, which *Barnes* discredited, the Sereboffs offer little to undermine the plain indication in *Barnes* that the fund over which a lien is asserted need not be in existence when the contract containing the lien provision is executed. See 4 S. Symons, Pomeroy's Equity Jurisprudence § 1236, pp. 699–700 (5th ed. 1941) ("[A]n agreement to charge, or to assign . . . property not yet in existence," although "creat[ing] no legal estate or interest in the things when they afterwards come into existence . . . does constitute an equitable lien upon the property" just as would "a lien upon specific things existing and owned by the contracting party at the date of the contract"); *Peugh* v. *Porter,* 112 U. S. 737, 742 (1885) ("[I]n contemplation of equity, [it] is not material" that the "very fund now in dispute" was "not . . . in existence" when an equitable lien over that fund was created). Indeed, the most they can muster in this regard are several state cases predating *Barnes* and a single decision that rests, contrary to the Sereboffs' characterization, on the simple conclusion that a contractual provision purporting to secure an equitable lien did not properly do so. See Brief for Petitioners 26; Reply Brief for Petitioners 12; *Taylor* v. *Wharton*, 43 App. D. C. 104 (1915).

The Sereboffs finally fall back on the argument that *Barnes* announced a special rule for attorneys claiming an equitable lien over funds promised under a contingency fee arrangement. Outside of this context, they say, the "typical rules regarding equitable liens by assignment" persisted and would have prevented recovery here. Reply Brief for Petitioners 13.

But *Barnes* did not attach any particular significance to the identity of the parties seeking recovery. See 232 U. S., at 119. And as *Barnes* itself makes clear, other cases of this Court—not involving attorney's contingency fees—apply the same "familiar rul[e] of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing." *Id.*, at 121. In *Walker* v. *Brown*, 165 U. S. 654 (1897), for instance, the Court approved an equitable lien over municipal bonds transferred to a company to facilitate its business. When a supplier of the company suspended shipments because of delinquent debts, the individual who had transferred the bonds assured the supplier that "'any indebtedness that they may be owing you at any time, shall be paid before the return to me of these bonds . . . and that these bonds . . . are at the risk of the business of [the company], so far as any claim you may have against [it].'" *Id.*, at 663. The Court found that this undertaking created an equitable lien on the bonds, which the supplier could enforce against the individual after the bonds had been returned to him when the company became insolvent. *Id.*, at 666. As in *Barnes*, the Court resolved the case by applying general equitable principles, stating that "[t]o dedicate property to a particular purpose, to provide that a specified creditor and that creditor alone shall be authorized to seek payment of his debt from the property or its value, is unmistakably to create an equitable lien." 165 U. S., at 666.

### C

Shifting gears, the Sereboffs contend that the lower courts erred in allowing enforcement of the "Acts of Third Parties" provision, without imposing various limitations that they say would apply to "truly equitable relief grounded in principles of subrogation." Reply Brief for Petitioners 5. According to the Sereboffs, they would in an equitable *subrogation* action be able to assert certain equitable defenses, such as the defense that subrogation may be pursued only after a victim had been made whole for his injuries. *Id.*, at 5–6. Such defenses should be available against Mid Atlantic's action, the Sereboffs claim, despite the plan provision that "[Mid Atlantic's] share of the recovery will not be reduced because [the beneficiary] has not received the full damages claimed, unless [Mid Atlantic] agrees in writing to a reduction." App. to Pet. for Cert. 38a.

But Mid Atlantic's claim is not considered equitable because it is a subrogation claim. As explained, Mid Atlantic's action to enforce the "Acts of Third Parties" provision qualifies as an equitable remedy because it is indistinguishable from an action to enforce an equitable lien established by agreement, of the sort epitomized by our decision in *Barnes*. See 4 Palmer, Law of Restitution § 23.18*(d)*, at 470 (A subrogation lien "is not an express lien based on agreement, but instead is an equitable lien impressed on moneys on the ground that they ought to go to the insurer"). Mid Atlantic need not characterize its claim as a freestanding action for equitable subrogation. Accordingly, the parcel of equitable defenses the Sereboffs claim accompany any such action are beside the point.[2]

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[2] The Sereboffs argue that, even if the relief Mid Atlantic sought was "equitable" under § 502(a)(3), it was not "appropriate" under that provision in that it contravened principles like the make-whole doctrine. Neither

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Under the teaching of *Barnes* and similar cases, Mid Atlantic's action in the District Court properly sought "equitable relief" under § 502(a)(3); the judgment of the Fourth Circuit is affirmed in relevant part.

*It is so ordered.*

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the District Court nor the Court of Appeals considered the argument that Mid Atlantic's claim was not "appropriate" apart from the contention that it was not "equitable," and from our examination of the record it does not appear that the Sereboffs raised this distinct assertion below. We decline to consider it for the first time here. See *National Collegiate Athletic Assn.* v. *Smith*, 525 U. S. 459, 470 (1999).

# S. D. WARREN CO. *v.* MAINE BOARD OF ENVIRONMENTAL PROTECTION ET AL.

## CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

No. 04–1527. Argued February 21, 2006—Decided May 15, 2006

Petitioner company (Warren) asked the Federal Energy Regulatory Commission (FERC) to renew federal licenses for five of the hydroelectric dams it operates on a Maine river to generate power for its paper mill. Each dam impounds water, which is then run through turbines and returned to the riverbed, passing around a section of the river. Under protest, Warren applied for water quality certifications from respondent Maine Board of Environmental Protection pursuant to §401 of the Clean Water Act, which requires state approval of "any activity" "which may result in any discharge into the [Nation's] navigable waters." FERC licensed the dams subject to compliance with those certifications, which require Warren to maintain a minimum stream flow and to allow passage for certain fish and eels. After losing state administrative appeals, Warren filed suit in a state court, which rejected Warren's claim that its dams do not result in a "discharge" under §401. The State Supreme Judicial Court affirmed.

*Held:* Because a dam raises a potential for a discharge, §401 is triggered and state certification is required. Pp. 375–387.

(a) The Clean Water Act does not define "discharge," but provides that the term "when used without qualification includes a discharge of a pollutant, and a discharge of pollutants," 33 U. S. C. §1362(16). But "discharge" is presumably broader, else superfluous, and since it is neither defined nor a term of art, it should be construed "in accordance with its ordinary or natural meaning," *FDIC* v. *Meyer*, 510 U. S. 471, 476. When applied to water, discharge commonly means "flowing or issuing out," Webster's New International Dictionary 742. This Court has consistently intended that meaning in prior water cases, including the only case focused on §401, *PUD No. 1 of Jefferson Cty.* v. *Washington Dept. of Ecology*, 511 U. S. 700, in which no one questioned that the discharge of water from a dam fell within §401's ambit. The Environmental Protection Agency and FERC have also regularly read "discharge" to cover releases from hydroelectric dams. Pp. 375–378.

(b) Warren's three arguments for avoiding this common reading are unavailing. The canon *noscitur a sociis*—"a word is known by the company it keeps," *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 575—does not apply here. Warren claims that since "discharge" is keeping company with "discharge" defined as adding one or more pollutants, see § 1362(12), discharge standing alone must also require the addition of something foreign to the water. This argument seems to assume that pairing a broad statutory term with a narrow one shrinks the broad one, but there is no such general usage of language this way. Warren also relies on *South Fla. Water Management Dist.* v. *Miccosukee Tribe,* 541 U. S. 95, but that case is not on point. It addressed § 402, not § 401, and the two sections are not interchangeable, as they serve different purposes and use different language to reach them. Thus, that something must be added in order to implicate § 402 does not explain what suffices for a discharge under § 401. Finally, the Clean Water Act's legislative history, if it means anything, goes against Warren's reading of "discharge." Pp. 378–384.

(c) Warren's arguments against reading "discharge" in its common sense also miss the forest for the trees. Congress passed the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U. S. C. § 1251(a), the "national goal" being to achieve "water quality [providing] for the protection and propagation of fish . . . and . . . for recreation," § 1251(a)(2). To do this, the Act deals with "pollution" generally, see § 1251(b), which it defines as "the man-made or man-induced alteration of the [water's] chemical, physical, biological, and radiological integrity," § 1362(19). Because the alteration of water quality as thus defined is a risk inherent in limiting river flow and releasing water through turbines, changes in the river's flow, movement, and circulation fall within a State's legitimate legislative business. State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution. Reading § 401 to give "discharge" its common and ordinary meaning preserves the state authority apparently intended. Pp. 384–387.

868 A. 2d 210, affirmed.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined, and in which SCALIA, J., joined as to all but Part III–C.

*William J. Kayatta, Jr.,* argued the cause for petitioner. With him on the briefs was *Matthew D. Manahan.*

*G. Steven Rowe,* Attorney General of Maine, argued the cause for respondents. With him on the brief for Maine Board of Environmental Protection were *Paul Stern,* Deputy Attorney General, and *Carol A. Blasi* and *Gerald D. Reid,* Assistant Attorneys General. *Richard J. Lazarus, Daniel*

*H. Squire, Ethan G. Shenkman, Sean Mahoney,* and *Ronald A. Shems* filed a brief for American Rivers et al. as respondents under this Court's Rule 12.6.

*Jeffrey P. Minear* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Clement, Assistant Attorney General Wooldridge, Deputy Solicitor General Hungar, Greer S. Goldman, Ellen J. Durkee, John L. Smeltzer,* and *Ann R. Klee.**

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*Briefs of *amici curiae* urging reversal were filed for Augusta, Georgia, by *George A. Somerville;* for the Edison Electric Institute et al. by *Jeffrey L. Fisher, Daniel M. Adamson, Edward H. Comer, Kristy A. N. Bulleit, James H. Hancock, Jr.,* and *Richard S. Wasserstrom;* for the National Association of Home Builders et al. by *Virginia S. Albrecht, Karma B. Brown, Kathy Robb, Duane J. Desiderio,* and *Thomas Jon Ward;* for the New England Legal Foundation by *Martin J. Newhouse, Andrew R. Grainger,* and *Michael E. Malamut;* and for the Salt River Project Agricultural Improvement and Power District by *John B. Weldon, Jr.,* and *Lisa M. McKnight.*

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Eliot Spitzer,* Attorney General of New York, *Caitlin J. Halligan,* Solicitor General, *Robert H. Easton,* Deputy Solicitor General, *Peter H. Lehner, Gregory Silbert,* Assistant Solicitor General, and *James M. Tierney,* Assistant Attorney General, by *Rob McKenna,* Attorney General of Washington, and *Brian Faller* and *Ron Lavigne,* Assistant Attorneys General, by *Roberto J. Sánchez Ramos,* Secretary of Justice of Puerto Rico, by *Susan Shinkman,* and by the Attorneys General for their respective States as follows: *David W. Márquez* of Alaska, *Terry Goddard* of Arizona, *Bill Lockyer* of California, *Richard Blumenthal* of Connecticut, *Carl C. Danberg* of Delaware, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Gregory D. Stumbo* of Kentucky, *Charles C. Foti, Jr.,* of Louisiana, *J. Joseph Curran, Jr.,* of Maryland, *Thomas F. Reilly* of Massachusetts, *Michael A. Cox* of Michigan, *Mike Hatch* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *George J. Chanos* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Peter C. Harvey* of New Jersey, *Patricia A. Madrid* of New Mexico, *Roy Cooper* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Patrick C. Lynch* of Rhode Island, *Henry McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Paul G. Summers* of Tennessee, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of

JUSTICE SOUTER delivered the opinion of the Court.†

The issue in this case is whether operating a dam to produce hydroelectricity "may result in any discharge into the navigable waters" of the United States. If so, a federal license under § 401 of the Clean Water Act requires state certification that water protection laws will not be violated. We hold that a dam does raise a potential for a discharge, and state approval is needed.

## I

The Presumpscot River runs through southern Maine from Sebago Lake to Casco Bay, and in the course of its 25 miles petitioner, S. D. Warren Company, operates several hydropower dams to generate electricity for its paper mill. Each dam creates a pond, from which water funnels into a "power canal," through turbines, and back to the riverbed, passing around a section of the river just below the impoundment.

It is undisputed that since 1935, Warren has needed a license to operate the dams, currently within the authority of the Federal Energy Regulatory Commission (FERC) under the Federal Power Act. 16 U. S. C. §§ 817(1), 792; see also Public Utility Act of 1935, § 210, 49 Stat. 846. FERC grants these licenses for periods up to 50 years, 16 U. S. C. § 799,

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Vermont, *Darrell V. McGraw, Jr.*, of West Virginia, and *Peggy S. Lautenschlager* of Wisconsin; for Friends of the Everglades by *John E. Childe;* for Former Assistant Administrators of the United States Environmental Protection Agency by *Robert G. Dreher, Jennifer Chavez,* and *Howard I. Fox;* for the Hoopa Valley Tribe et al. by *Thomas P. Schlosser, Carl Ullman,* and *Daniel A. Raas;* for the Miccosukee Tribe of Indians of Florida by *Dexter W. Lehtinen, Claudio Riedi, Sonia Escobio O'Donnell,* and *Enrique D. Arana;* the National Wildlife Federation et al. by *David K. Mears;* for Trout Unlimited et al. by *James B. Dougherty;* for Water Quality and Riverine Scientists by *Richard Roos-Collins* and *Steven P. Malloch;* and for Senator James M. Jeffords by *Mr. Jeffords, pro se.*

*Benjamin S. Sharp, Guy R. Martin,* and *Karen M. McGaffey* filed a brief for the Western Urban Water Coalition as *amicus curiae.*

†JUSTICE SCALIA joins all but Part III–C of this opinion.

after a review that looks to environmental issues as well as the rising demand for power, § 797(e).

Over 30 years ago, Congress enacted a specific provision for licensing an activity that could cause a "discharge" into navigable waters; a license is conditioned on a certification from the State in which the discharge may originate that it will not violate certain water quality standards, including those set by the State's own laws. See Water Quality Improvement Act of 1970, § 103, 84 Stat. 108. Today, this requirement can be found in § 401 of the Clean Water Act, 86 Stat. 877, 33 U. S. C. § 1341: "Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable water[s] shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . ." § 1341(a)(1).

> "Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with [§§ 1311, 1312, 1316, and 1317] and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section."[1] § 1341(d).

In 1999, Warren sought to renew federal licenses for five of its hydroelectric dams. It applied for water quality certifications from the Maine Department of Environmental Protection (the state agency responsible for what have come to be known as "401 state certifications"), but it filed its application under protest, claiming that its dams do not result in any "discharge into" the river triggering application of § 401.

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[1] The statutes cross-referenced go to effluent limitations and other limitations, 33 U. S. C. §§ 1311, 1312, standards of performance, § 1316, and toxic effluent standards, § 1317. As we have explained before, "state water quality standards adopted pursuant to § 303 [of the Clean Water Act, 33 U. S. C. § 1313,] are among the 'other limitations' with which a State may ensure compliance through the § 401 certification process." *PUD No. 1 of Jefferson Cty.* v. *Washington Dept. of Ecology*, 511 U. S. 700, 713 (1994).

The Maine agency issued certifications that required Warren to maintain a minimum stream flow in the bypassed portions of the river and to allow passage for various migratory fish and eels. When FERC eventually licensed the five dams, it did so subject to the Maine conditions, and Warren continued to deny any need of § 401 state certification. After appealing unsuccessfully to Maine's administrative appeals tribunal, the Board of Environmental Protection, Warren filed this suit in the State's Cumberland County Superior Court. That court rejected Warren's argument that its dams do not result in discharges, and the Supreme Judicial Court of Maine affirmed. 2005 ME 27, 868 A. 2d 210. We granted certiorari, 546 U. S. 933 (2005), and now affirm as well.

## II

The dispute turns on the meaning of the word "discharge," the key to the state certification requirement under § 401.[2] The Act has no definition of the term, but provides that "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants."[3] 33 U. S. C. § 1362(16). It does define "discharge of a pollutant" and "discharge of pollutants" as meaning "any addition of any pollutant to navigable waters from any point source."

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[2] No one disputes that the Presumpscot River is a navigable water of the United States.

[3] The term "pollutant" is defined in the Act to mean "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U. S. C. § 1362(6).

§ 1362(12). But "discharge" presumably is broader, else superfluous, and since it is neither defined in the statute nor a term of art, we are left to construe it "in accordance with its ordinary or natural meaning." *FDIC* v. *Meyer,* 510 U. S. 471, 476 (1994).

When it applies to water, "discharge" commonly means a "flowing or issuing out," Webster's New International Dictionary 742 (2d ed. 1954); see also *ibid.* ("[t]o emit; to give outlet to; to pour forth; as, the Hudson *discharges* its waters into the bay"), and this ordinary sense has consistently been the meaning intended when this Court has used the term in prior water cases. See, *e. g., Marsh* v. *Oregon Natural Resources Council,* 490 U. S. 360, 364 (1989) (describing a dam's " 'multiport' structure, which will permit discharge of water from any of five levels"); *Arizona* v. *California,* 373 U. S. 546, 619, n. 25 (1963) (Harlan, J., dissenting in part) (quoting congressional testimony regarding those who " 'take . . . water out of the stream which has been discharged from the reservoir' "); *United States* v. *Arizona,* 295 U. S. 174, 181 (1935) ("Parker Dam will intercept waters discharged at Boulder Dam").

In fact, this understanding of the word "discharge" was accepted by all Members of the Court sitting in our only other case focused on § 401 of the Clean Water Act, *PUD No. 1 of Jefferson Cty.* v. *Washington Dept. of Ecology,* 511 U. S. 700 (1994). At issue in *PUD No. 1* was the State of Washington's authority to impose minimum stream flow rates on a hydroelectric dam, and in posing the question presented, the Court said this:

> "There is no dispute that petitioners were required to obtain a certification from the State pursuant to § 401. Petitioners concede that, at a minimum, the project will result in two possible discharges—the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the

> tailrace after the water has been used to generate electricity." *Id.*, at 711.

The *Pud No. 1* petitioners claimed that a state condition imposing a stream flow requirement on discharges of water from a dam exceeded the State's §401 authority to prevent degradation of water quality, but neither the parties nor the Court questioned that the "discharge of water" from the dam was a discharge within the ambit of §401. *Ibid.* And although the Court's opinion made no mention of the dam as adding anything to the water, the majority's use of the phrase "discharge of water" drew no criticism from the dissent, which specifically noted that "[t]he term 'discharge' is not defined in the [Clean Water Act] but its plain and ordinary meaning suggests 'a flowing or issuing out,' or 'something that is emitted.'" *Id.*, at 725 (opinion of THOMAS, J.) (quoting Webster's Ninth New Collegiate Dictionary 360 (1991)).

In resort to common usage under §401, this Court has not been alone, for the Environmental Protection Agency (EPA) and FERC have each regularly read "discharge" as having its plain meaning and thus covering releases from hydroelectric dams. See, *e. g.*, EPA, Water Quality Standards Handbook §7.6.3, p. 7–10 (2d ed. 1994) ("EPA has identified five Federal permits and/or licenses that authorize activities that may result in a discharge to the waters[, including] licenses required for hydroelectric projects issued under the Federal Power Act"); *FPL Energy Maine Hydro LLC,* 111 FERC ¶61,104, p. 61,505 (2005) (rejecting, in a recent adjudication, the argument that Congress "used the term 'discharge' as nothing more than a shorthand expression for 'discharge of a pollutant or pollutants'").[4] Warren is, of course, entirely correct in cautioning us that because neither the EPA nor FERC has formally settled the definition, or even set out agency reasoning, these expressions of agency understanding do not command deference from this Court. See *Gonzales* v. *Oregon*, 546 U. S. 243, 258 (2006) ("*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved"); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). But even so, the administrative usage of "discharge" in this way confirms our understanding of the everyday sense of the term.

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[4] Warren relies on a document from the EPA as a counterexample of the EPA's position in this regard. See Memorandum from Ann R. Klee, EPA General Counsel, et al., to Regional Administrators, regarding "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to

## III

Warren makes three principal arguments for reading the term "discharge" differently from the ordinary way. We find none availing.

### A

The first involves an interpretive canon we think is out of place here. The canon, *noscitur a sociis*, reminds us that "a word is known by the company it keeps," *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 575 (1995), and is invoked when a string of statutory terms raises the implication that the "words grouped in a list should be given related meaning," *Dole* v. *Steelworkers*, 494 U. S. 26, 36 (1990) (internal quotation marks omitted); see also *Beecham* v. *United States*, 511 U. S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well").

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Water Transfers" (Aug. 5, 2005), available at http://www.epa.gov/ogc/documents/water_transfers.pdf (as visited Apr. 13, 2006, and available in Clerk of Court's case file). The memorandum does not help Warren, however; it interprets §402 of the Clean Water Act, not §401, and construes the statutory phrase "discharge of a pollutant," which, as explained below, implies a meaning different under the statute from the word "discharge" used alone. The memorandum, in fact, declares that "[i]t does not address any . . . terms under the statute other than 'addition.'" *Id.*, at 18.

Warren claims that the canon applies to § 502(16) of the Clean Water Act, which provides that "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." 33 U. S. C. § 1362(16). Warren emphasizes that the "include[d]" terms, pollutant discharges, are themselves defined to require an "addition" of pollutants to water. § 1362(12). Since "discharge" pure and simple is keeping company with "discharge" defined as adding one or more pollutants, Warren says "discharge" standing alone must require the addition of something foreign to the water into which the discharge flows. And because the release of water from the dams adds nothing to the river that was not there above the dams, Warren concludes that water flowing out of the turbines cannot be a discharge into the river.[5]

The problem with Warren's argument is that it purports to extrapolate a common feature from what amounts to a single item (discharge of a pollutant plus the plural variant involving more than one pollutant). See *Beecham, supra,* at 371. The argument seems to assume that pairing a broad statutory term with a narrow one shrinks the broad one, but there is no such general usage; giving one example does not convert express inclusion into restrictive equation, and *noscitur a sociis* is no help absent some sort of gathering with a common feature to extrapolate. It should also go without saying that uncritical use of interpretive rules is especially risky in making sense of a complicated statute like the Clean Water Act, where technical definitions are worked out with great effort in the legislative process. Cf. H. R. Rep. No. 92–911, p. 125 (1972) ("[I]t is extremely important to an understanding of [§ 402] to know the definition of the various terms used and a careful reading of the definitions . . . is recommended. Of particular significance [are] the words 'discharge of pollutants' ").

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[5] We note that the Supreme Judicial Court of Maine accepted the assertion that "[a]n 'addition' is the fundamental characteristic of any discharge." 2005 ME 27, ¶ 11, 868 A. 2d 210, 215. It then held that Warren's dams add to the Presumpscot River because the water "los[es its] status as waters of the United States" when diverted from its natural course, and becomes an addition to the waters of the United States when redeposited into the river. 868 A. 2d, at 216 (emphasis deleted). We disagree that an addition is fundamental to any discharge, nor can we agree that one can denationalize national waters by exerting private control over them. Cf. *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 69 (1913) ("[T]hat the running water in a great navigable stream is capable of private ownership is inconceivable"). Thus, though we affirm the Maine judgment, we do so on different reasoning.

### B

Regardless, Warren says the statute should, and even must, be read its way, on the authority of *South Fla. Water Management Dist.* v. *Miccosukee Tribe,* 541 U. S. 95 (2004). But that case is not on point. *Miccosukee* addressed § 402 of the Clean Water Act, not § 401, and the two sections are not interchangeable, as they serve different purposes and use different language to reach them. Section 401 recast pre-existing law and was meant to "continu[e] the authority of the State . . . to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State." S. Rep. No. 92–414, p. 69 (1971). Its terms have a broad reach, requiring state approval any time a federally licensed activity "may" result in a discharge ("discharge" of course being without any qualifiers here), 33 U. S. C. § 1341(a)(1), and its object comprehends maintaining state water quality standards, see n. 1, *supra.*

Section 402 has a historical parallel with § 401, for the legislative record suggests that it, too, was enacted to consolidate and ease the administration of some predecessor regulatory schemes, see H. R. Rep. No. 92–911, at 124–125. But it contrasts with § 401 in its more specific focus. It establishes what Congress called the National Pollutant Discharge Elimination System, requiring a permit for the "discharge of any pollutant" into the navigable waters of the United States, 33 U. S. C. § 1342(a). The triggering statutory term here is not the word "discharge" alone, but "discharge of a pollutant," a phrase made narrower by its specific definition requiring an "addition" of a pollutant to the water. § 1362(12).

The question in *Miccosukee* was whether a pump between a canal and an impoundment produced a "discharge of a pollutant" within the meaning of § 402, see 541 U. S., at 102–103, and the Court accepted the shared view of the parties that if two identified volumes of water are "simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants," *id.*, at 109. *Miccosukee* was thus concerned only with whether an "addition" had been made (phosphorous being the substance in issue) as required by the definition of the phrase "discharge of a pollutant"; it did not matter under § 402 whether pumping the water produced a discharge without any addition. In sum, the understanding that something must be added in order to implicate § 402 does not explain what suffices for a discharge under § 401.[6]

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[6] The fact that the parties in *Miccosukee* conceded that the water being pumped was polluted does not transform the Court's analysis from one centered on the word "addition" to one centered on the word "discharge." Before *Miccosukee*, one could have argued that transferring polluted water from a canal to a connected impoundment constituted an "addition." *Miccosukee* is at odds with that construction of the statute, but it says nothing about whether the transfer of polluted water from the canal to the impoundment constitutes a "discharge."

Likewise, we are not persuaded by Warren's claim that the word "into" somehow changes the meaning of the word "discharge" so as to require an addition. See Reply Brief for Petitioner 1–2 ("However one might read the lone word 'discharge' by itself, the complete statutory phrase 'discharge into the navigable waters' entails the introduction of something into the waters"). The force of this argument escapes us, since one can easily refer to water being poured or discharged out of one place into another without implying that an addition of some hitherto unencountered mixture or quality of water is made. Indeed, the preposition "into" was used without connoting an addition in the *Miccosukee* analogy cited by Warren. See 541 U. S., at 110 ("[I]f one takes a ladle of soup from a

### C

Warren's third argument for avoiding the common meaning of "discharge" relies on the Act's legislative history, but we think that if the history means anything it actually goes against Warren's position. Warren suggests that the word "includes" in the definition of "discharge" should not be read with any spacious connotation, because the word was simply left on the books inadvertently after a failed attempt to deal specifically with "thermal discharges." As Warren describes it, several Members of Congress recognized that "heat is not as harmful as what most of us view as 'pollutants,' because it dissipates quickly in most bodies of receiving waters," 1 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–1, p. 273 (1973) (remarks of Rep. Clark), and they proposed to regulate thermal discharges less stringently than others. They offered an amendment to exclude thermal discharges from the requirements under § 402, but they also wanted to ensure that thermal discharges remained within the scope of § 401 and so sought to include them expressly in the general provision covering "discharge." See *id.*, at 1069–1070, 1071. The proposed definition read, "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, a discharge of pollutants, and a thermal discharge." *Id.*, at 1071.

Of course, Congress omitted the reference to "thermal discharge," and settled on the definition we have today. See Federal Water Pollution Control Act Amendments of 1972, § 502(16), 86 Stat. 887. Warren reasons that once Congress abandoned the special treatment for thermal pollutants, it merely struck the words "thermal discharge" from 33 U. S. C. § 1362(16) and carelessly left in the word "includes."

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pot . . . and pours it back into the pot, one has not 'added' soup or anything else to the pot" (internal quotation marks and brackets omitted)).

Thus, Warren argues, there is no reason to assume that describing "discharge" as including certain acts was meant to extend the reach of § 401 beyond acts of the kind specifically mentioned;[7] the terminology of § 401 simply reflects a failed effort to narrow the scope of § 402.

This is what might be called a lawyer's argument. We will assume that Warren is entirely correct about the impetus behind the failed attempt to rework the scope of pollutant discharge under § 402. It is simply speculation, though, to say that the word "includes" was left in the description of a "discharge" by mere inattention, and for reasons given in Part IV of this opinion it is implausible speculation at that. But if we confine our view for a moment strictly to the drafting history, the one thing clear is that if Congress had left "thermal discharge" as an included subclass of a "discharge" under § 502(16), Warren would have a stronger *noscitur a sociis* argument. For a thermal discharge adds something, the pollutant heat, see n. 3, *supra*. Had the list of examples of discharge been lengthened to include thermal discharges, there would have been at least a short series with the common feature of addition. As it stands, however, the only thing the legislative history cited by Warren demonstrates is the congressional rejection of language that would have created a short series of terms with a common implication of an addition.

Warren's theory, moreover, has the unintended consequence of underscoring that Congress probably distinguished the terms "discharge" and "discharge of pollutants" deliberately, in order to use them in separate places and to separate ends. Warren hypothesizes that Congress attempted to tinker with the definition of "discharge" because it wanted to subject thermal discharges to the requirements of § 401, but not § 402. But this assumption about Congress's motives only confirms the point that when Congress fine-tunes its statutory definitions, it tends to do so with a purpose in mind. See *Bates* v. *United States,* 522 U. S. 23, 29–30 (1997) (if "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted)).

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[7] Warren is hesitant to follow its own logic to completion by simply claiming that § 401 covers nothing but what § 502(16) mentions, the discharge of a pollutant or pollutants.

## IV

Warren's arguments against reading the word "discharge" in its common sense fail on their own terms.[8] They also miss the forest for the trees.

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[8] Warren briefly makes another argument for disregarding the plain meaning of the word "discharge," relying on § 511(c)(2) of the Clean Water Act, 33 U. S. C. § 1371(c)(2). This section addresses the intersection of the Act with another statute, the National Environmental Policy Act of 1969 (NEPA), 42 U. S. C. § 4321 *et seq.* NEPA "imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Department of Transportation* v. *Public Citizen,* 541 U. S. 752, 756–757 (2004). Section 511(c)(2) makes the point that nothing in NEPA authorizes any federal agency "authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant" to review "any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under [§ 401]." 33 U. S. C. § 1371(c)(2)(A). Warren argues that reading § 401 to cover discharges generally would preclude duplicative NEPA review of certifications involving pollutant discharges, but allow such review of those involving nonpollutant discharges.

But Warren overlooks the fact that "discharge of a pollutant" is used in § 511(c)(2) in the course of identifying the agency, not the activity to be certified. Whether a § 401 certification involves an activity that discharges pollutants or one that simply discharges, FERC (as an agency that may be described, always, as one with "author[ity] to license or permit the conduct of any activity which may result in the discharge of a pollutant," *ibid.*) may not review it. Thus, nothing in § 511(c)(2) is disturbed by our holding that hydroelectric dams require § 401 state certifications. It is still the case that, when a State has issued a certification covering a discharge that adds no pollutant, no federal agency will be deemed to have

Congress passed the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U. S. C. §1251(a); see also *PUD No. 1*, 511 U. S., at 714, the "national goal" being to achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water," 33 U. S. C. §1251(a)(2). To do this, the Act does not stop at controlling the "addition of pollutants," but deals with "pollution" generally, see §1251(b), which Congress defined to mean "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water," §1362(19).

The alteration of water quality as thus defined is a risk inherent in limiting river flow and releasing water through turbines. Warren itself admits that its dams "can cause changes in the movement, flow, and circulation of a river . . . caus[ing] a river to absorb less oxygen and to be less passable by boaters and fish." Brief for Petitioner 23. And several *amici* alert us to the chemical modification caused by the dams, with "immediate impact on aquatic organisms, which of course rely on dissolved oxygen in water to breathe." Brief for Trout Unlimited et al. as *Amici Curiae* 13; see also, *e. g.*, Brief for National Wildlife Federation et al. as *Amici Curiae* 6 (explaining that when air and water mix in a turbine, nitrogen dissolves in the water and can be potentially lethal to fish). Then there are the findings of the Maine Department of Environmental Protection that led to this appeal:

> "The record in this case demonstrates that Warren's dams have caused long stretches of the natural river bed to be essentially dry and thus unavailable as habitat for indigenous populations of fish and other aquatic organisms; that the dams have blocked the passage of eels

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authority under NEPA to "review" any limitations or the adequacy of the §401 certification.

> and sea-run fish to their natural spawning and nursery waters; that the dams have eliminated the opportunity for fishing in long stretches of river, and that the dams have prevented recreational access to and use of the river." *In re S. D. Warren Co.*, L–19713–33–E–N etc. (2003), in App. to Pet. for Cert. A–49.

Changes in the river like these fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns. See 33 U. S. C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"); § 1256(a) (federal funds for state efforts to prevent pollution); see also § 1370 (States may impose standards on the discharge of pollutants that are stricter than federal ones).

State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution, as Senator Muskie explained on the floor when what is now § 401 was first proposed:

> "No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements." 116 Cong. Rec. 8984 (1970).

These are the very reasons that Congress provided the States with power to enforce "any other appropriate requirement of State law," 33 U. S. C. § 1341(d), by imposing conditions on federal licenses for activities that may result in a discharge, *ibid.*

Reading § 401 to give "discharge" its common and ordinary meaning preserves the state authority apparently intended. The judgment of the Supreme Judicial Court of Maine is therefore affirmed.

*It is so ordered.*

# EBAY INC. ET AL. *v.* MERCEXCHANGE, L. L. C.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 05–130. Argued March 29, 2006—Decided May 15, 2006

Petitioners operate popular Internet Web sites that allow private sellers to list goods they wish to sell. Respondent sought to license its business method patent to petitioners, but no agreement was reached. In respondent's subsequent patent infringement suit, a jury found that its patent was valid, that petitioners had infringed the patent, and that damages were appropriate. However, the District Court denied respondent's motion for permanent injunctive relief. In reversing, the Federal Circuit applied its "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances." 401 F. 3d 1323, 1339.

*Held:* The traditional four-factor test applied by courts of equity when considering whether to award permanent injunctive relief to a prevailing plaintiff applies to disputes arising under the Patent Act. That test requires a plaintiff to demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law are inadequate to compensate for that injury; (3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. The decision to grant or deny such relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion. These principles apply with equal force to Patent Act disputes. "[A] major departure from the long tradition of equity practice should not be lightly implied." *Weinberger* v. *Romero-Barcelo,* 456 U. S. 305, 320. Nothing in the Act indicates such a departure. Pp. 391–394.

401 F. 3d 1323, vacated and remanded.

THOMAS, J., delivered the opinion for a unanimous Court. ROBERTS, C. J., filed a concurring opinion, in which SCALIA and GINSBURG, JJ., joined, *post,* p. 394. KENNEDY, J., filed a concurring opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined, *post,* p. 395.

*Carter G. Phillips* argued the cause for petitioners. With him on the briefs were *Richard D. Bernstein, Virginia A. Seitz,* and *Allan M. Soobert.*

*Jeffrey P. Minear* argued the cause for the United States as *amicus curiae* in support of respondent. With him on the brief were *Solicitor General Clement, Assistant Attorney General Barnett, Acting Assistant Attorney General Katsas, Deputy Solicitor General Hungar, Anthony J. Steinmeyer, David Seidman, Mark R. Freeman, John M. Whealan, Cynthia C. Lynch,* and *Heather F. Auyang.*

*Seth P. Waxman* argued the cause for respondent. With him on the brief were *Paul R. Q. Wolfson, Scott L. Robertson, Gregory N. Stillman, Jennifer A. Albert, David M. Young,* and *Brian M. Buroker.**

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*Briefs of *amici curiae* urging reversal were filed for the American Innovators' Alliance by *Theodore B. Olson* and *Matthew D. McGill;* for the Association of the Bar of the City of New York by *James W. Dabney* and *Peter A. Sullivan;* for the Business Software Alliance et al. by *Kenneth S. Geller* and *Andrew J. Pincus;* for the Computer & Communications Industry Association by *Jonathan Band;* for the Electronic Frontier Foundation et al. by *Jason Schultz;* for Nokia Corp. by *Michael P. Kenny;* for Research in Motion, Ltd., by *Martin R. Glick, Sarah M. King, Herbert L. Fenster, Lawrence S. Ebner, Henry C. Bunsow, David W. Long,* and *Mark L. Whitaker;* for the Securities Industry Association et al. by *W. Hardy Callcott* and *Richard Whiting;* for Time Warner Inc. et al. by *Kathleen M. Sullivan, Daniel H. Bromberg,* and *Margret M. Caruso;* for Yahoo! Inc. by *Christopher J. Wright, Timothy J. Simeone,* and *Lisa G. McFall;* and for Malla Pollack et al. by *Ms. Pollack, pro se.*

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *Michael S. Greco, Robert F. Altherr, Jr., Nina L. Medlock,* and *Joseph M. Potenza;* for the Biotechnology Industry Organization by *Nancy J. Linck* and *Brian P. Barrett;* for the General Electric Co. et al. by *John C. Englander, J. Anthony Downs, Kevin P. Martin,* and *William F. Sheehan;* for Law Professors by *Thomas G. Field, Jr., Craig S. Jepson,* and *Karl F. Jorda,* all *pro se;* for the Pharmaceutical Research and Manufacturers of America by *Harry J. Roper, Aaron A. Barlow, Paul M. Smith,* and *Katherine A. Fallow;* for Qualcomm Inc. et al. by *Kenneth C. Bass III, Robert G. Sterne, Edward J. Kessler,* and *Linda E. Horner;* for Rembrandt IP Management, LLC, by *Lawrence S. Robbins* and *Roy T. Englert, Jr.;* for Technology, Patents & Licensing, Inc., et al. by *Keara A. Bergin;* for the United Inventors Association et al. by *Robert M. Asher* and *Erik Paul Belt;* for Various Law & Economics Professors by *F. Scott Kieff* and *Richard A. Epstein,* both *pro se;* for the Wisconsin Alumni Re-

JUSTICE THOMAS delivered the opinion of the Court.

Ordinarily, a federal court considering whether to award permanent injunctive relief to a prevailing plaintiff applies the four-factor test historically employed by courts of equity. Petitioners eBay Inc. and Half.com, Inc., argue that this traditional test applies to disputes arising under the Patent Act. We agree and, accordingly, vacate the judgment of the Court of Appeals.

## I

Petitioner eBay operates a popular Internet Web site that allows private sellers to list goods they wish to sell, either through an auction or at a fixed price. Petitioner Half.com, now a wholly owned subsidiary of eBay, operates a similar Web site. Respondent MercExchange, L. L. C., holds a number of patents, including a business method patent for an electronic market designed to facilitate the sale of goods between private individuals by establishing a central authority to promote trust among participants. See U. S. Patent No. 5,845,265. MercExchange sought to license its patent to eBay and Half.com, as it had previously done with other companies, but the parties failed to reach an agreement. MercExchange subsequently filed a patent infringement suit against eBay and Half.com in the United States District Court for the Eastern District of Virginia. A jury found

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search Foundation et al. by *Gary M. Hoffman* and *Woody N. Peterson;* for Martin Cooper et al. by *Justin A. Nelson, Parker C. Folse III, Stephen D. Susman, Mark L. D. Wawro,* and *Max L. Tribble, Jr.;* and for Steven M. Hoffberg by *Robert J. Rando* and *Mr. Hoffberg, pro se.*

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association et al. by *Joseph S. Cianfrani, Melvin C. Garner,* and *Martha B. Schneider;* for the Association of American Universities et al. by *Morgan Chu* and *Laura W. Brill;* for International Business Machines Corp. by *Christopher A. Hughes* and *Mark J. Abate;* for the Patent, Trademark & Copyright Section of the Bar Association of the District of Columbia by *Blair E. Taylor* and *Susan M. Dadio;* for Teva Pharmaceuticals USA, Inc., by *James Galbraith* and *Elizabeth J. Holland;* and for 52 Intellectual Property Professors by *Mark A. Lemley, pro se.*

that MercExchange's patent was valid, that eBay and Half.com had infringed that patent, and that an award of damages was appropriate.[1]

Following the jury verdict, the District Court denied MercExchange's motion for permanent injunctive relief. 275 F. Supp. 2d 695 (2003). The Court of Appeals for the Federal Circuit reversed, applying its "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances." 401 F. 3d 1323, 1339 (2005). We granted certiorari to determine the appropriateness of this general rule. 546 U. S. 1029 (2005).

## II

According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. See, *e. g., Weinberger* v. *Romero-Barcelo,* 456 U. S. 305, 311–313 (1982); *Amoco Production Co.* v. *Gambell,* 480 U. S. 531, 542 (1987). The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion. See, *e. g., Romero-Barcelo,* 456 U. S., at 320.

These familiar principles apply with equal force to disputes arising under the Patent Act. As this Court has long recognized, "a major departure from the long tradition of equity practice should not be lightly implied." *Ibid.;* see also *Amoco, supra,* at 542. Nothing in the Patent Act indicates that Congress intended such a departure. To the contrary, the Patent Act expressly provides that injunctions "may" issue "in accordance with the principles of equity." 35 U. S. C. § 283.[2]

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[1] EBay and Half.com continue to challenge the validity of MercExchange's patent in proceedings pending before the United States Patent and Trademark Office.

To be sure, the Patent Act also declares that "patents shall have the attributes of personal property," § 261, including "the right to exclude others from making, using, offering for sale, or selling the invention," § 154(a)(1). According to the Court of Appeals, this statutory right to exclude alone justifies its general rule in favor of permanent injunctive relief. 401 F. 3d, at 1338. But the creation of a right is distinct from the provision of remedies for violations of that right. Indeed, the Patent Act itself indicates that patents shall have the attributes of personal property "[s]ubject to the provisions of this title," 35 U. S. C. § 261, including, presumably, the provision that injunctive relief "may" issue only "in accordance with the principles of equity," § 283.

This approach is consistent with our treatment of injunctions under the Copyright Act. Like a patent owner, a copyright holder possesses "the right to exclude others from using his property." *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127 (1932); see also *id.*, at 127–128 ("A copyright, like a patent, is at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals and the incentive to further efforts for the same important objects" (internal quotation marks omitted)). Like the Patent Act, the Copyright Act provides that courts "may" grant injunctive relief "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U. S. C. § 502(a). And as in our decision today, this Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction auto-

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[2] Section 283 provides that "[t]he several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable."

matically follows a determination that a copyright has been infringed. See, *e. g., New York Times Co.* v. *Tasini,* 533 U. S. 483, 505 (2001) (citing *Campbell* v. *Acuff-Rose Music, Inc.,* 510 U. S. 569, 578, n. 10 (1994)); *Dun* v. *Lumbermen's Credit Assn.,* 209 U. S. 20, 23–24 (1908).

Neither the District Court nor the Court of Appeals below fairly applied these traditional equitable principles in deciding respondent's motion for a permanent injunction. Although the District Court recited the traditional four-factor test, 275 F. Supp. 2d, at 711, it appeared to adopt certain expansive principles suggesting that injunctive relief could not issue in a broad swath of cases. Most notably, it concluded that a "plaintiff's willingness to license its patents" and "its lack of commercial activity in practicing the patents" would be sufficient to establish that the patent holder would not suffer irreparable harm if an injunction did not issue. *Id.,* at 712. But traditional equitable principles do not permit such broad classifications. For example, some patent holders, such as university researchers or self-made inventors, might reasonably prefer to license their patents, rather than undertake efforts to secure the financing necessary to bring their works to market themselves. Such patent holders may be able to satisfy the traditional four-factor test, and we see no basis for categorically denying them the opportunity to do so. To the extent that the District Court adopted such a categorical rule, then, its analysis cannot be squared with the principles of equity adopted by Congress. The court's categorical rule is also in tension with *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.,* 210 U. S. 405, 422–430 (1908), which rejected the contention that a court of equity has no jurisdiction to grant injunctive relief to a patent holder who has unreasonably declined to use the patent.

In reversing the District Court, the Court of Appeals departed in the opposite direction from the four-factor test. The court articulated a "general rule," unique to patent disputes, "that a permanent injunction will issue once infringement and validity have been adjudged." 401 F. 3d, at 1338. The court further indicated that injunctions should be denied only in the "unusual" case, under "exceptional circumstances" and "'in rare instances . . . to protect the public interest.'" *Id.*, at 1338–1339. Just as the District Court erred in its categorical denial of injunctive relief, the Court of Appeals erred in its categorical grant of such relief. Cf. *Roche Products, Inc.* v. *Bolar Pharmaceutical Co.*, 733 F. 2d 858, 865 (CA Fed. 1984) (recognizing the "considerable discretion" district courts have "in determining whether the facts of a situation require it to issue an injunction").

Because we conclude that neither court below correctly applied the traditional four-factor framework that governs the award of injunctive relief, we vacate the judgment of the Court of Appeals, so that the District Court may apply that framework in the first instance. In doing so, we take no position on whether permanent injunctive relief should or should not issue in this particular case, or indeed in any number of other disputes arising under the Patent Act. We hold only that the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards.

Accordingly, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE GINSBURG join, concurring.

I agree with the Court's holding that "the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards," *ante*, at 394, and I join the opinion of the Court. That opinion rightly rests on the proposition that "a major departure from the long tradition of equity practice should not be lightly implied." *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 320 (1982); see *ante*, at 391.

From at least the early 19th century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases. This "long tradition of equity practice" is not surprising, given the difficulty of protecting a right to *exclude* through monetary remedies that allow an infringer to *use* an invention against the patentee's wishes—a difficulty that often implicates the first two factors of the traditional four-factor test. This historical practice, as the Court holds, does not *entitle* a patentee to a permanent injunction or justify a *general rule* that such injunctions should issue. The Federal Circuit itself so recognized in *Roche Products, Inc.* v. *Bolar Pharmaceutical Co.*, 733 F. 2d 858, 865–867 (1984). At the same time, there is a difference between exercising equitable discretion pursuant to the established four-factor test and writing on an entirely clean slate. "Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin* v. *Franklin Capital Corp.*, 546 U. S. 132, 139 (2005). When it comes to discerning and applying those standards, in this area as others, "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921) (opinion for the Court by Holmes, J.).

JUSTICE KENNEDY, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, concurring.

The Court is correct, in my view, to hold that courts should apply the well-established, four-factor test—without resort to categorical rules—in deciding whether to grant injunctive relief in patent cases. THE CHIEF JUSTICE is also correct that history may be instructive in applying this test. *Ante,* at 395 (concurring opinion). The traditional practice of issuing injunctions against patent infringers, however, does not seem to rest on "the difficulty of protecting a right to *exclude* through monetary remedies that allow an infringer to *use* an invention against the patentee's wishes." *Ibid.* (ROBERTS, C. J., concurring). Both the terms of the Patent Act and the traditional view of injunctive relief accept that the existence of a right to exclude does not dictate the remedy for a violation of that right. *Ante,* at 391–392 (opinion of the Court). To the extent earlier cases establish a pattern of granting an injunction against patent infringers almost as a matter of course, this pattern simply illustrates the result of the four-factor test in the contexts then prevalent. The lesson of the historical practice, therefore, is most helpful and instructive when the circumstances of a case bear substantial parallels to litigation the courts have confronted before.

In cases now arising trial courts should bear in mind that in many instances the nature of the patent being enforced and the economic function of the patent holder present considerations quite unlike earlier cases. An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees. See FTC, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy, ch. 3, pp. 38–39 (Oct. 2003), available at http://www.ftc.gov/os/2003/10/innovationrpt.pdf (as visited May 11, 2006, and available in Clerk of Court's case file). For these firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent. See *ibid.* When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest. In addition injunctive relief may have different consequences for the burgeoning number of patents over business methods, which were not of much economic and legal significance in earlier times. The potential vagueness and suspect validity of some of these patents may affect the calculus under the four-factor test.

The equitable discretion over injunctions, granted by the Patent Act, is well suited to allow courts to adapt to the rapid technological and legal developments in the patent system. For these reasons it should be recognized that district courts must determine whether past practice fits the circumstances of the cases before them. With these observations, I join the opinion of the Court.

# BRIGHAM CITY, UTAH *v.* STUART ET AL.

## CERTIORARI TO THE SUPREME COURT OF UTAH

No. 05–502. Argued April 24, 2006—Decided May 22, 2006

Responding to a 3 a.m. call about a loud party, police arrived at the house in question, heard shouting inside, proceeded down the driveway, and saw two juveniles drinking beer in the backyard. Entering the yard, they saw through a screen door and windows an altercation in the kitchen between four adults and a juvenile, who punched one of the adults, causing him to spit blood in a sink. An officer opened the screen door and announced the officers' presence. Unnoticed amid the tumult, the officer entered the kitchen and again cried out, whereupon the altercation gradually subsided. The officers arrested respondents and charged them with contributing to the delinquency of a minor and related offenses. The trial court granted their motion to suppress all evidence obtained after the officers entered the home on the ground that the warrantless entry violated the Fourth Amendment, and the Utah Court of Appeals affirmed. Affirming, the State Supreme Court held that the injury caused by the juvenile's punch was insufficient to trigger the "emergency aid doctrine" because it did not give rise to an objectively reasonable belief that an unconscious, semiconscious, or missing person feared injured or dead was in the home. Furthermore, the court suggested the doctrine was inapplicable because the officers had not sought to assist the injured adult but had acted exclusively in a law enforcement capacity. The court also held that the entry did not fall within the exigent circumstances exception to the warrant requirement.

*Held:* Police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.

Because the Fourth Amendment's ultimate touchstone is "reasonableness," the warrant requirement is subject to certain exceptions. For example, one exigency obviating the requirement is the need to render emergency assistance to occupants of private property who are seriously injured or threatened with such injury. *Mincey* v. *Arizona*, 437 U. S. 385, 392. This Court has repeatedly rejected respondents' contention that, in assessing the reasonableness of an entry, consideration should be given to the subjective motivations of individual officers. Because the officers' subjective motivation is irrelevant, *Bond* v. *United States*, 529 U. S. 334, 338, n. 2, it does not matter here whether they entered the kitchen to arrest respondents and gather evidence or to assist the injured and prevent further violence. *Indianapolis* v. *Edmond*, 531 U. S. 32, 46, and *Florida* v. *Wells*, 495 U. S. 1, 4, distinguished. Relying on this Court's holding in *Welsh* v. *Wisconsin*, 466 U. S. 740, 753, that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made," respondents further contend that their conduct was not serious enough to justify the officers' intrusion into the home. This contention is misplaced. In *Welsh*, the "only potential emergency" confronting the officers was the need to preserve evidence of the suspect's blood-alcohol level, an exigency the Court held insufficient under the circumstances to justify a warrantless entry into the suspect's home. *Ibid.* Here, the officers were confronted with *ongoing* violence occurring *within* the home, a situation *Welsh* did not address.

The officers' entry here was plainly reasonable under the circumstances. Given the tumult at the house when they arrived, it was obvious that knocking on the front door would have been futile. Moreover, in light of the fracas they observed in the kitchen, the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence was just beginning. Nothing in the Fourth Amendment required them to wait until another blow rendered someone unconscious, semiconscious, or worse before entering. The manner of their entry was also reasonable, since nobody heard the first announcement of their presence, and it was only after the announcing officer stepped into the kitchen and announced himself again that the tumult subsided. That announcement was at least equivalent to a knock on the screen door and, under the circumstances, there was no violation of the Fourth Amendment's knock-and-announce rule. Furthermore, once the announcement was made, the officers were free to enter; it would serve no purpose to make them stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence. Pp. 403–407.

2005 UT 13, 122 P. 3d 506, reversed and remanded.

ROBERTS, C. J., delivered the opinion for a unanimous Court. STEVENS, J., filed a concurring opinion, *post*, p. 407.

*Jeffrey S. Gray*, Assistant Attorney General of Utah, argued the cause for petitioner. With him on the briefs were *Mark L. Shurtleff*, Attorney General, *Kirk M. Torgensen*, Chief Deputy Attorney General, and *J. Frederic Voros, Jr.*

*Deputy Attorney General McNulty* argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Clement, Assistant Attorney General Fisher, Deputy Solicitor General Dreeben,* and *Patricia A. Millett.*

*Michael P. Studebaker* argued the cause and filed a brief for respondents.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In this case we consider whether police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury. We conclude that they may.

## I

This case arises out of a melee that occurred in a Brigham City, Utah, home in the early morning hours of July 23, 2000. At about 3 a.m., four police officers responded to a call re-

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*Briefs of *amici curiae* urging reversal were filed for the State of Michigan et al. by *Michael A. Cox,* Attorney General of Michigan, *Thomas L. Casey,* Solicitor General, by *Kym L. Worthy* and *Timothy Baughman,* and by the Attorneys General for their respective States as follows: *John W. Suthers* of Colorado, *M. Jane Brady* of Delaware, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Phill Kline* of Kansas, *J. Joseph Curran, Jr.,* of Maryland, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Wayne Stenehjem* of North Dakota, *Hardy Myers* of Oregon, *Tom Corbett* of Pennsylvania, *William Sorrell* of Vermont, *Rob McKenna* of Washington, and *Patrick J. Crank* of Wyoming; for the Fraternal Order of Police by *Larry H. James* and *Laura MacGregor Comek;* and for the National League of Cities et al. by *Richard Ruda* and *Lawrence Rosenthal.*

*Jonathan D. Hacker* and *Pamela Harris* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

*Wayne W. Schmidt, James P. Manak, Richard Weintraub,* and *Bernard J. Farber* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae.*

garding a loud party at a residence. Upon arriving at the house, they heard shouting from inside, and proceeded down the driveway to investigate. There, they observed two juveniles drinking beer in the backyard. They entered the backyard, and saw—through a screen door and windows—an altercation taking place in the kitchen of the home. According to the testimony of one of the officers, four adults were attempting, with some difficulty, to restrain a juvenile. The juvenile eventually "broke free, swung a fist and struck one of the adults in the face." 2005 UT 13, ¶ 2, 122 P. 3d 506, 508. The officer testified that he observed the victim of the blow spitting blood into a nearby sink. App. 40. The other adults continued to try to restrain the juvenile, pressing him up against a refrigerator with such force that the refrigerator began moving across the floor. At this point, an officer opened the screen door and announced the officers' presence. Amid the tumult, nobody noticed. The officer entered the kitchen and again cried out, and as the occupants slowly became aware that the police were on the scene, the altercation ceased.

The officers subsequently arrested respondents and charged them with contributing to the delinquency of a minor, disorderly conduct, and intoxication. In the trial court, respondents filed a motion to suppress all evidence obtained after the officers entered the home, arguing that the warrantless entry violated the Fourth Amendment. The court granted the motion, and the Utah Court of Appeals affirmed.

Before the Supreme Court of Utah, Brigham City argued that although the officers lacked a warrant, their entry was nevertheless reasonable on either of two grounds. The court rejected both contentions and, over two dissenters, affirmed. First, the court held that the injury caused by the juvenile's punch was insufficient to trigger the so-called "emergency aid doctrine" because it did not give rise to an "objectively reasonable belief that an unconscious, semiconscious, or missing person feared injured or dead [was] in the home." 122 P. 3d, at 513 (internal quotation marks omitted). Furthermore, the court suggested that the doctrine was inapplicable because the officers had not sought to assist the injured adult, but instead had acted "exclusively in their law enforcement capacity." *Ibid.*

The court also held that the entry did not fall within the exigent circumstances exception to the warrant requirement. This exception applies, the court explained, where police have probable cause and where "a reasonable person [would] believe that the entry was necessary to prevent physical harm to the officers or other persons." *Id.*, at 514 (internal quotation marks omitted). Under this standard, the court stated, the potential harm need not be as serious as that required to invoke the emergency aid exception. Although it found the case "a close and difficult call," the court nevertheless concluded that the officers' entry was not justified by exigent circumstances. *Id.*, at 515.

We granted certiorari, 546 U. S. 1085 (2006), in light of differences among state courts and the Courts of Appeals concerning the appropriate Fourth Amendment standard governing warrantless entry by law enforcement in an emergency situation. Compare *In re Sealed Case 96–3167,* 153 F. 3d 759, 766 (CADC 1998) ("[T]he standard for exigent circumstances is an objective one"), and *People* v. *Hebert,* 46 P. 3d 473, 480 (Colo. 2002) (en banc) (considering the circumstances as they "would have been objectively examined by a prudent and trained police officer"), with *United States* v. *Cervantes,* 219 F. 3d 882, 890 (CA9 2000) ("[U]nder the emergency doctrine, '[a] search must not be primarily motivated by intent to arrest and seize evidence'" (quoting *People* v. *Mitchell,* 39 N. Y. 2d 173, 177, 347 N. E. 2d 607, 609 (1976)), and *State* v. *Mountford,* 171 Vt. 487, 492, 769 A. 2d 639, 645 (2000) (*Mitchell* test "requir[es] courts to find that the primary subjective motivation behind such searches was to provide emergency aid").

## II

It is a "'basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.'" *Groh* v. *Ramirez,* 540 U. S. 551, 559 (2004) (quoting *Payton* v. *New York,* 445 U. S. 573, 586 (1980); some internal quotation marks omitted). Nevertheless, because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. *Flippo* v. *West Virginia,* 528 U. S. 11, 13 (1999) (*per curiam*); *Katz* v. *United States,* 389 U. S. 347, 357 (1967). We have held, for example, that law enforcement officers may make a warrantless entry onto private property to fight a fire and investigate its cause, *Michigan* v. *Tyler,* 436 U. S. 499, 509 (1978), to prevent the imminent destruction of evidence, *Ker* v. *California,* 374 U. S. 23, 40 (1963) (plurality opinion), or to engage in "'hot pursuit'" of a fleeing suspect, *United States* v. *Santana,* 427 U. S. 38, 42, 43 (1976). "[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey* v. *Arizona,* 437 U. S. 385, 393–394 (1978).

One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. "'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'" *Id.,* at 392 (quoting *Wayne* v. *United States,* 318 F. 2d 205, 212 (CADC 1963) (Burger, J.)); see also *Tyler, supra,* at 509. Accordingly, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. *Mincey, supra,* at 392; see also *Georgia* v. *Randolph, ante,* at 118 ("[I]t would be silly to suggest that the police would commit a tort by entering . . . to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur").

Respondents do not take issue with these principles, but instead advance two reasons why the officers' entry here was unreasonable. First, they argue that the officers were more interested in making arrests than quelling violence. They urge us to consider, in assessing the reasonableness of the entry, whether the officers were "indeed motivated primarily by a desire to save lives and property." Brief for Respondents 3; see also Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 6 (entry to render emergency assistance justifies a search "only when the searching officer is acting outside his traditional law-enforcement capacity"). The Utah Supreme Court also considered the officers' subjective motivations relevant. See 122 P. 3d, at 513 (search under the "emergency aid doctrine" may not be "primarily motivated by intent to arrest and seize evidence" (internal quotation marks omitted)).

Our cases have repeatedly rejected this approach. An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, "as long as the circumstances, viewed *objectively,* justify [the] action." *Scott* v. *United States,* 436 U. S. 128, 138 (1978) (emphasis added). The officer's subjective motivation is irrelevant. See *Bond* v. *United States,* 529 U. S. 334, 338, n. 2 (2000) ("The parties properly agree that the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment . . . ; the issue is not his state of mind, but the objective effect of his actions"); *Whren* v. *United States,* 517 U. S. 806, 813 (1996) ("[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers"); *Graham* v. *Connor,* 490 U. S. 386, 397 (1989) ("[O]ur prior cases make clear" that "the subjective motivations of the individual officers . . . ha[ve] no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment"). It therefore does not matter here—even if their subjective motives could be so neatly unraveled—whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence.

As respondents note, we have held in the context of programmatic searches conducted without individualized suspicion—such as checkpoints to combat drunk driving or drug trafficking—that "an inquiry into *programmatic* purpose" is sometimes appropriate. *Indianapolis* v. *Edmond,* 531 U. S. 32, 46 (2000) (emphasis added); see also *Florida* v. *Wells,* 495 U. S. 1, 4 (1990) (an inventory search must be regulated by "standardized criteria" or "established routine" so as not to "be a ruse for a general rummaging in order to discover incriminating evidence"). But this inquiry is directed at ensuring that the purpose behind the *program* is not "ultimately indistinguishable from the general interest in crime control." *Edmond,* 531 U. S., at 44. It has nothing to do with discerning what is in the mind of the individual officer conducting the search. *Id.,* at 48.

Respondents further contend that their conduct was not serious enough to justify the officers' intrusion into the home. They rely on *Welsh* v. *Wisconsin,* 466 U. S. 740, 753 (1984), in which we held that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." This contention, too, is misplaced. *Welsh* involved a warrantless entry by officers to arrest a suspect for driving while intoxicated. There, the "only potential emergency" confronting the officers was the need to preserve evidence (*i. e.,* the suspect's blood-alcohol level)—an exigency that we held insufficient under the circumstances to justify entry into the suspect's home. *Ibid.* Here, the officers were confronted with *ongoing* violence occurring *within* the home. *Welsh* did not address such a situation.

We think the officers' entry here was plainly reasonable under the circumstances. The officers were responding, at 3 o'clock in the morning, to complaints about a loud party. As they approached the house, they could hear from within "an altercation occurring, some kind of a fight." App. 29. "It was loud and it was tumultuous." *Id.*, at 33. The officers heard "thumping and crashing" and people yelling "stop, stop" and "get off me." *Id.*, at 28, 29. As the trial court found, "it was obvious that . . . knocking on the front door" would have been futile. *Id.*, at 92. The noise seemed to be coming from the back of the house; after looking in the front window and seeing nothing, the officers proceeded around back to investigate further. They found two juveniles drinking beer in the backyard. From there, they could see that a fracas was taking place inside the kitchen. A juvenile, fists clenched, was being held back by several adults. As the officers watch, he breaks free and strikes one of the adults in the face, sending the adult to the sink spitting blood.

In these circumstances, the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning. Nothing in the Fourth Amendment required them to wait until another blow rendered someone "unconscious" or "semi-conscious" or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided.

The manner of the officers' entry was also reasonable. After witnessing the punch, one of the officers opened the screen door and "yelled in police." *Id.*, at 40. When nobody heard him, he stepped into the kitchen and announced himself again. Only then did the tumult subside. The officer's announcement of his presence was at least equivalent to a knock on the screen door. Indeed, it was probably the only option that had even a chance of rising above the din. Under these circumstances, there was no violation of the Fourth Amendment's knock-and-announce rule. Furthermore, once the announcement was made, the officers were free to enter; it would serve no purpose to require them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence.

Accordingly, we reverse the judgment of the Supreme Court of Utah, and remand the case for further proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE STEVENS, concurring.

This is an odd flyspeck of a case. The charges that have been pending against respondents for the past six years are minor offenses—intoxication, contributing to the delinquency of a minor, and disorderly conduct—two of which could have been proved by evidence that was gathered by the responding officers before they entered the home. The maximum punishment for these crimes ranges between 90 days and 6 months in jail. And the Court's unanimous opinion restating well-settled rules of federal law is so clearly persuasive that it is hard to imagine the outcome was ever in doubt.

Under these circumstances, the only difficult question is which of the following is the most peculiar: (1) that the Utah trial judge, the intermediate state appellate court, and the Utah Supreme Court all found a Fourth Amendment violation on these facts; (2) that the prosecution chose to pursue this matter all the way to the United States Supreme Court; or (3) that this Court voted to grant the petition for a writ of certiorari.

A possible explanation for the first is that the suppression ruling was correct as a matter of Utah law, and neither trial counsel nor the trial judge bothered to identify the Utah Constitution as an independent basis for the decision because they did not expect the prosecution to appeal.* The most plausible explanation for the latter two decisions is that they were made so police officers in Utah may enter a home without a warrant when they see ongoing violence—we are, of course, reversing the Utah Supreme Court's conclusion to the contrary. But that purpose, laudable though it may be, cannot be achieved in this case. Our holding today addresses only the limitations placed by the Federal Constitution on the search at issue; we have no authority to decide whether the police in this case violated the Utah Constitution.

The Utah Supreme Court, however, has made clear that the Utah Constitution provides greater protection to the privacy of the home than does the Fourth Amendment. See *State* v. *DeBooy,* 2000 UT 32, ¶ 12, 996 P. 2d 546, 549. And it complained in this case of respondents' failure to raise or adequately brief a state constitutional challenge, thus preventing the state courts from deciding the case on anything other than Fourth Amendment grounds. See 2005 UT 13, ¶ 12, 122 P. 3d 506, 510. "[S]urpris[ed]" by "[t]he reluctance of litigants to take up and develop a state constitutional analysis," *ibid.,* the court expressly invited future litigants to bring challenges under the Utah Constitution to enable it to fulfill its "responsibility as guardians of the individual liberty of our citizens" and "undertak[e] a principled exploration of the interplay between federal and state protections of individual rights," *id.,* at 511. The fact that this admonishment and request came from the Utah Supreme Court in this very case not only demonstrates that the prosecution selected the wrong case for establishing the rule it wants, but also indicates that the Utah Supreme Court would probably adopt the same rule as a matter of state constitutional law that we reject today under the Federal Constitution.

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*Indeed, it was the prosecution that prepared the trial court's order granting respondents' motion to suppress. See 2002 UT App. 317, ¶ 4, 57 P. 3d 1111, 1112.

Whether or not that forecast is accurate, I can see no reason for this Court to cause the Utah courts to redecide the question as a matter of state law. Federal interests are not offended when a single State elects to provide greater protection for its citizens than the Federal Constitution requires. Indeed, I continue to believe "that a policy of judicial restraint—one that allows other decisional bodies to have the last word in legal interpretation until it is truly necessary for this Court to intervene—enables this Court to make its most effective contribution to our federal system of government." *Michigan* v. *Long*, 463 U. S. 1032, 1067 (1983) (STEVENS, J., dissenting). Thus, while I join the Court's opinion, I remain persuaded that my vote to deny the State's petition for certiorari was correct.

# GARCETTI ET AL. *v.* CEBALLOS

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–473. Argued October 12, 2005—Reargued March 21, 2006—Decided May 30, 2006

Respondent Ceballos, a supervising deputy district attorney, was asked by defense counsel to review a case in which, counsel claimed, the affidavit police used to obtain a critical search warrant was inaccurate. Concluding after the review that the affidavit made serious misrepresentations, Ceballos relayed his findings to his supervisors, petitioners here, and followed up with a disposition memorandum recommending dismissal. Petitioners nevertheless proceeded with the prosecution. At a hearing on a defense motion to challenge the warrant, Ceballos recounted his observations about the affidavit, but the trial court rejected the challenge. Claiming that petitioners then retaliated against him for his memo in violation of the First and Fourteenth Amendments, Ceballos filed a 42 U. S. C. § 1983 suit. The District Court granted petitioners summary judgment, ruling, *inter alia*, that the memo was not protected speech because Ceballos wrote it pursuant to his employment duties. Reversing, the Ninth Circuit held that the memo's allegations were protected under the First Amendment analysis in *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, and *Connick* v. *Myers*, 461 U. S. 138.

*Held:* When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. Pp. 417–426.

(a) Two inquiries guide interpretation of the constitutional protections accorded public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. See *Pickering, supra*, at 568. If the answer is no, the employee has no First Amendment cause of action based on the employer's reaction to the speech. See *Connick, supra*, at 147. If the answer is yes, the possibility of a First Amendment claim arises. The question becomes whether the government employer had an adequate justification for treating the employee differently from any other member of the general public. See *Pickering, supra*, at 568. This consideration reflects the importance of the relationship between the speaker's expressions and employment. Without a significant degree of control over its employees' words and actions, a government employer would have little chance to provide public services efficiently. Cf. *Connick, supra,* at 143. Thus, a government entity has broader discretion to restrict speech when it acts in its employer role, but the restrictions it imposes must be directed at speech that has some potential to affect its operations. On the other hand, a citizen who works for the government is nonetheless still a citizen. The First Amendment limits a public employer's ability to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. See *Perry* v. *Sindermann,* 408 U. S. 593, 597. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. See, *e. g., Connick, supra,* at 147. Pp. 417–420.

(b) Proper application of the Court's precedents leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail. The dispositive factor here is not that Ceballos expressed his views inside his office, rather than publicly, see, *e. g., Givhan* v. *Western Line Consol. School Dist.,* 439 U. S. 410, 414, nor that the memo concerned the subject matter of his employment, see, *e. g., Pickering, supra,* at 573. Rather, the controlling factor is that Ceballos' expressions were made pursuant to his official duties. That consideration distinguishes this case from those in which the First Amendment provides protection against discipline. Ceballos wrote his disposition memo because that is part of what he was employed to do. He did not act as a citizen by writing it. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Cf. *Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U. S. 819, 833. This result is consistent with the Court's prior emphasis on the potential societal value of employee speech and on affording government employers sufficient discretion to manage their operations. Ceballos' proposed contrary rule, adopted by the Ninth Circuit, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in the Court's precedents. The doctrinal anomaly the Court of Appeals perceived in compelling public employers to tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties misconceives the theoretical underpinnings of this Court's decisions and is unfounded as a practical matter. Pp. 420–425.

(c) Exposing governmental inefficiency and misconduct is a matter of considerable significance, and various measures have been adopted to protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions. These include federal and state whistle-blower protection laws and labor codes and, for government attorneys, rules of conduct and constitutional obligations apart from the First Amendment. However, the Court's precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job. Pp. 425–426.

361 F. 3d 1168, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 426. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 427. BREYER, J., filed a dissenting opinion, *post*, p. 444.

*Cindy S. Lee* argued and reargued the cause for petitioners. With her on the briefs were *Jin S. Choi* and *Doraine F. Meyer.*

*Dan Himmelfarb* argued, and *Deputy Solicitor General Kneedler* reargued, the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Clement, Assistant Attorney General Keisler, Mr. Himmelfarb, William Kanter, Michael E. Robinson, Mark A. Robbins, Steven E. Abow,* and *Robin M. Richardson.*

*Bonnie I. Robin-Vergeer* argued and reargued the cause for respondent. With her on the brief were *Scott L. Nelson* and *Brian Wolfman.**

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*Briefs of *amici curiae* urging reversal were filed for the International Municipal Lawyers Association by *Gene C. Schaerr, Linda T. Coberly, Peter Kryn Dykema,* and *Henry W. Underhill, Jr.;* for the National Asso-

JUSTICE KENNEDY delivered the opinion of the Court.

It is well settled that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick* v. *Myers*, 461 U. S. 138, 142 (1983). The question presented by the instant case is whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.

## I

Respondent Richard Ceballos has been employed since 1989 as a deputy district attorney for the Los Angeles County District Attorney's Office. During the period relevant to this case, Ceballos was a calendar deputy in the office's Pomona branch, and in this capacity he exercised certain supervisory responsibilities over other lawyers. In February 2000, a defense attorney contacted Ceballos about a pending criminal case. The defense attorney said there were inaccuracies in an affidavit used to obtain a critical search warrant. The attorney informed Ceballos that he

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ciation of Counties et al. by *Richard Ruda* and *James I. Crowley;* and for the National School Boards Association by *Naomi Gittins, Julie Underwood, Lisa Soronen,* and *Thomas E. Wheeler II.*

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt, James B. Coppess,* and *Laurence Gold;* for the Association of Deputy District Attorneys et al. by *Jody Manier Kris;* for the Government Accountability Project et al. by *Joanne Royce;* for the National Association of Criminal Defense Lawyers et al. by *Michael C. Small, Jeffrey L. Fisher,* and *Steven R. Shapiro;* for the National Treasury Employees Union by *Gregory O'Duden, Elaine D. Kaplan, Barbara A. Atkin,* and *Julie Sarah Lehrman;* and for the Thomas Jefferson Center for the Protection of Free Expression et al. by *J. Joshua Wheeler, Robert M. O'Neil, Donna R. Euben,* and *David M. Rabban.*

*Robert H. Chanin* and *Jeremiah A. Collins* filed a brief for the National Education Association as *amicus curiae.*

had filed a motion to traverse, or challenge, the warrant, but he also wanted Ceballos to review the case. According to Ceballos, it was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases.

After examining the affidavit and visiting the location it described, Ceballos determined the affidavit contained serious misrepresentations. The affidavit called a long driveway what Ceballos thought should have been referred to as a separate roadway. Ceballos also questioned the affidavit's statement that tire tracks led from a stripped-down truck to the premises covered by the warrant. His doubts arose from his conclusion that the roadway's composition in some places made it difficult or impossible to leave visible tire tracks.

Ceballos spoke on the telephone to the warrant affiant, a deputy sheriff from the Los Angeles County Sheriff's Department, but he did not receive a satisfactory explanation for the perceived inaccuracies. He relayed his findings to his supervisors, petitioners Carol Najera and Frank Sundstedt, and followed up by preparing a disposition memorandum. The memo explained Ceballos' concerns and recommended dismissal of the case. On March 2, 2000, Ceballos submitted the memo to Sundstedt for his review. A few days later, Ceballos presented Sundstedt with another memo, this one describing a second telephone conversation between Ceballos and the warrant affiant.

Based on Ceballos' statements, a meeting was held to discuss the affidavit. Attendees included Ceballos, Sundstedt, and Najera, as well as the warrant affiant and other employees from the sheriff's department. The meeting allegedly became heated, with one lieutenant sharply criticizing Ceballos for his handling of the case.

Despite Ceballos' concerns, Sundstedt decided to proceed with the prosecution, pending disposition of the defense motion to traverse. The trial court held a hearing on the motion. Ceballos was called by the defense and recounted his observations about the affidavit, but the trial court rejected the challenge to the warrant.

Ceballos claims that in the aftermath of these events he was subjected to a series of retaliatory employment actions. The actions included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion. Ceballos initiated an employment grievance, but the grievance was denied based on a finding that he had not suffered any retaliation. Unsatisfied, Ceballos sued in the United States District Court for the Central District of California, asserting, as relevant here, a claim under Rev. Stat. § 1979, 42 U. S. C. § 1983. He alleged petitioners violated the First and Fourteenth Amendments by retaliating against him based on his memo of March 2.

Petitioners responded that no retaliatory actions were taken against Ceballos and that all the actions of which he complained were explained by legitimate reasons such as staffing needs. They further contended that, in any event, Ceballos' memo was not protected speech under the First Amendment. Petitioners moved for summary judgment, and the District Court granted their motion. Noting that Ceballos wrote his memo pursuant to his employment duties, the court concluded he was not entitled to First Amendment protection for the memo's contents. It held in the alternative that even if Ceballos' speech was constitutionally protected, petitioners had qualified immunity because the rights Ceballos asserted were not clearly established.

The Court of Appeals for the Ninth Circuit reversed, holding that "Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment." 361 F. 3d 1168, 1173 (2004). In reaching its conclusion the court looked to the First Amendment analysis set forth in *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968), and *Connick*, *supra*. *Connick* instructs courts to begin by considering whether the expressions in question were made by the speaker "as a citizen upon matters of public concern." See *id.*, at 146–147. The Court of Appeals determined that Ceballos' memo, which recited what he thought to be governmental misconduct, was "inherently a matter of public concern." 361 F. 3d, at 1174. The court did not, however, consider whether the speech was made in Ceballos' capacity as a citizen. Rather, it relied on Circuit precedent rejecting the idea that "a public employee's speech is deprived of First Amendment protection whenever those views are expressed, to government workers or others, pursuant to an employment responsibility." *Id.*, at 1174–1175 (citing cases including *Roth* v. *Veteran's Admin. of Govt. of United States*, 856 F. 2d 1401 (CA9 1988)).

Having concluded that Ceballos' memo satisfied the public-concern requirement, the Court of Appeals proceeded to balance Ceballos' interest in his speech against his supervisors' interest in responding to it. See *Pickering, supra*, at 568. The court struck the balance in Ceballos' favor, noting that petitioners "failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office" as a result of the memo. See 361 F. 3d, at 1180. The court further concluded that Ceballos' First Amendment rights were clearly established and that petitioners' actions were not objectively reasonable. See *id.*, at 1181–1182.

Judge O'Scannlain specially concurred. Agreeing that the panel's decision was compelled by Circuit precedent, he nevertheless concluded Circuit law should be revisited and overruled. See *id.*, at 1185. Judge O'Scannlain emphasized the distinction "between speech offered by a public employee acting *as an employee* carrying out his or her ordinary job duties and that spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import." *Id.*, at 1187. In his view, "when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech that gives rise to a First Amendment right." *Id.*, at 1189.

We granted certiorari, 543 U. S. 1186 (2005), and we now reverse.

## II

As the Court's decisions have noted, for many years "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick*, 461 U. S., at 143. That dogma has been qualified in important respects. See *id.*, at 144–145. The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. See, *e. g.*, *Pickering*, *supra*, at 568; *Connick*, *supra*, at 147; *Rankin* v. *McPherson*, 483 U. S. 378, 384 (1987); *United States* v. *Treasury Employees*, 513 U. S. 454, 466 (1995).

*Pickering* provides a useful starting point in explaining the Court's doctrine. There the relevant speech was a teacher's letter to a local newspaper addressing issues including the funding policies of his school board. 391 U. S., at 566. "The problem in any case," the Court stated, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*, at 568. The Court found the teacher's speech "neither [was] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Id.*, at 572–573 (footnote omitted). Thus, the Court concluded that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.*, at 573.

*Pickering* and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. See *id.*, at 568. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. See *Connick, supra,* at 147. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. See *Pickering,* 391 U. S., at 568. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

To be sure, conducting these inquiries sometimes has proved difficult. This is the necessary product of "the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal." *Id.*, at 569. The Court's overarching objectives, though, are evident.

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. See, *e. g., Waters* v. *Churchill,* 511 U. S. 661, 671 (1994) (plurality opinion) ("[T]he government as employer indeed has far broader powers than does the government as sovereign"). Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. Cf. *Connick,* *supra,* at 143 ("[G]overnment offices could not function if every employment decision became a constitutional matter"). Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. See *Perry* v. *Sindermann,* 408 U. S. 593, 597 (1972). So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. See, *e. g., Connick, supra,* at 147 ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government").

The Court's employee-speech jurisprudence protects, of course, the constitutional rights of public employees. Yet the First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion. *Pickering* again provides an instructive example. The Court characterized its holding as rejecting the attempt of school administrators to "limi[t] teachers' opportunities to contribute to public debate." 391 U. S., at 573. It also noted that teachers are "the members of a community most likely to have informed and definite opinions" about school expenditures. *Id.,* at 572. The Court's approach acknowledged the necessity for informed, vibrant dialogue in a democratic society. It suggested, in addition, that widespread costs may arise when dialogue is repressed. The Court's more recent cases have expressed similar concerns. See, *e. g., San Diego* v. *Roe,* 543 U. S. 77, 82 (2004) *(per curiam)* ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it" (citation omitted)); cf. *Treasury Employees,* 513 U. S., at 470 ("The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said").

The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions. See, *e. g., Rankin,* 483 U. S., at 384 (recognizing "the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment"). Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to "constitutionalize the employee grievance." *Connick,* 461 U. S., at 154.

## III

With these principles in mind we turn to the instant case. Respondent Ceballos believed the affidavit used to obtain a search warrant contained serious misrepresentations. He conveyed his opinion and recommendation in a memo to his supervisor. That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work. See, *e. g., Givhan* v. *Western Line Consol. School Dist.,* 439 U. S. 410, 414 (1979). Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like "any member of the general public," *Pickering*, 391 U. S., at 573, to hold that all speech within the office is automatically exposed to restriction.

The memo concerned the subject matter of Ceballos' employment, but this, too, is nondispositive. The First Amendment protects some expressions related to the speaker's job. See, *e. g., ibid.; Givhan, supra*, at 414. As the Court noted in *Pickering:* "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." 391 U. S., at 572. The same is true of many other categories of public employees.

The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. See Brief for Respondent 4 ("Ceballos does not dispute that he prepared the memorandum 'pursuant to his duties as a prosecutor'"). That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do. It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction. The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Cf. *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 833 (1995) ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes"). Contrast, for example, the expressions made by the speaker in *Pickering*, whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.

Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.

This result is consistent with our precedents' attention to the potential societal value of employee speech. See *supra*, at 419–420. Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of protection, however, does not invest them with a right to perform their jobs however they see fit.

Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. Ceballos' memo is illustrative. It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff's department. If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.

Ceballos' proposed contrary rule, adopted by the Court of Appeals, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents. When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.

The Court of Appeals based its holding in part on what it perceived as a doctrinal anomaly. The court suggested it would be inconsistent to compel public employers to tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties. See 361 F. 3d, at 1176. This objection misconceives the theoretical underpinnings of our decisions. Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper, see *Pickering, supra,* or discussing politics with a co-worker, see *Rankin,* 483 U. S. 378. When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.

The Court of Appeals' concern also is unfounded as a practical matter. The perceived anomaly, it should be noted, is limited in scope: It relates only to the expressions an employee makes pursuant to his or her official responsibilities, not to statements or complaints (such as those at issue in cases like *Pickering* and *Connick*) that are made outside the duties of employment. If, moreover, a government employer is troubled by the perceived anomaly, it has the means at hand to avoid it. A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public.

Proper application of our precedents thus leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail.

Two final points warrant mentioning. First, as indicated above, the parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate. We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. See *post*, at 431, n. 2 (SOUTER, J., dissenting). The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Second, JUSTICE SOUTER suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. See *post*, at 438–439. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

## IV

Exposing governmental inefficiency and misconduct is a matter of considerable significance. As the Court noted in *Connick*, public employers should, "as a matter of good judgment," be "receptive to constructive criticism offered by their employees." 461 U. S., at 149. The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing. See, *e. g.*, 5 U. S. C. § 2302(b)(8); Cal. Govt. Code Ann. § 8547.8 (West 2005); Cal. Lab. Code Ann. § 1102.5 (West Supp. 2006). Cases involving government attorneys implicate additional safeguards in the form of, for example, rules of conduct and constitutional obligations apart from the First Amendment. See, *e. g.*, Cal. Rule Prof. Conduct 5–110 (2005) ("A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause"); *Brady* v. *Maryland*, 373 U. S. 83 (1963). These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.

We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE STEVENS, dissenting.

The proper answer to the question "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties," *ante*, at 413, is "Sometimes," not "Never." Of course a supervisor may take corrective action when such speech is "inflammatory or misguided," *ante*, at 423. But what if it is just unwelcome speech because it reveals facts that the supervisor would rather not have anyone else discover?*

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*See, *e. g.*, *Branton* v. *Dallas*, 272 F. 3d 730 (CA5 2001) (police internal investigator demoted by police chief after bringing the false testimony of a fellow officer to the attention of a city official); *Miller* v. *Jones*, 444 F. 3d 929, 936 (CA7 2006) (police officer demoted after opposing the police chief's attempt to "us[e] his official position to coerce a financially independent organization into a potentially ruinous merger"); *Delgado* v. *Jones*, 282 F. 3d 511 (CA7 2002) (police officer sanctioned for reporting criminal activity that implicated a local political figure who was a good friend of the police chief); *Herts* v. *Smith*, 345 F. 3d 581 (CA8 2003) (school district official's contract was not renewed after she gave frank testimony about the district's desegregation efforts); *Kincade* v. *Blue Springs*, 64 F. 3d 389 (CA8 1995) (engineer fired after reporting to his supervisors that contractors were failing to complete dam-related projects and that the resulting dam might be structurally unstable); *Fox* v. *District of Columbia*, 83 F. 3d

As JUSTICE SOUTER explains, public employees are still citizens while they are in the office. The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong. Over a quarter of a century has passed since then-Justice Rehnquist, writing for a unanimous Court, rejected "the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly." *Givhan* v. *Western Line Consol. School Dist.*, 439 U. S. 410, 414 (1979). We had no difficulty recognizing that the First Amendment applied when Bessie Givhan, an English teacher, raised concerns about the school's racist employment practices to the principal. See *id.*, at 413–416. Our silence as to whether or not her speech was made pursuant to her job duties demonstrates that the point was immaterial. That is equally true today, for it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description. Moreover, it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.

While today's novel conclusion to the contrary may not be "inflammatory," for the reasons stated in JUSTICE SOUTER's dissenting opinion it is surely "misguided."

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

The Court holds that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Ante*, at 421. I respectfully dissent.

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1491, 1494 (CADC 1996) (D. C. Lottery Board security officer fired after informing the police about a theft made possible by "rather drastic managerial ineptitude").

I agree with the majority that a government employer has substantial interests in effectuating its chosen policy and objectives, and in demanding competence, honesty, and judgment from employees who speak for it in doing their work. But I would hold that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.

## I

Open speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection by the First Amendment. See, *e. g., Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 377 (1997). At the other extreme, a statement by a government employee complaining about nothing beyond treatment under personnel rules raises no greater claim to constitutional protection against retaliatory response than the remarks of a private employee. See *Connick* v. *Myers*, 461 U. S. 138, 147 (1983). In between these points lies a public employee's speech unwelcome to the government but on a significant public issue. Such an employee speaking as a citizen, that is, with a citizen's interest, is protected from reprisal unless the statements are too damaging to the government's capacity to conduct public business to be justified by any individual or public benefit thought to flow from the statements. *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968). Entitlement to protection is thus not absolute.

This significant, albeit qualified, protection of public employees who irritate the government is understood to flow from the First Amendment, in part, because a government paycheck does nothing to eliminate the value to an individual of speaking on public matters, and there is no good reason for categorically discounting a speaker's interest in commenting on a matter of public concern just because the government employs him. Still, the First Amendment safeguard rests on something more, being the value to the public of receiving the opinions and information that a public employee may disclose. "Government employees are often in the best position to know what ails the agencies for which they work." *Waters* v. *Churchill*, 511 U. S. 661, 674 (1994).

The reason that protection of employee speech is qualified is that it can distract co-workers and supervisors from their tasks at hand and thwart the implementation of legitimate policy, the risks of which grow greater the closer the employee's speech gets to commenting on his own workplace and responsibilities. It is one thing for an office clerk to say there is waste in government and quite another to charge that his own department pays full-time salaries to part-time workers. Even so, we have regarded eligibility for protection by *Pickering* balancing as the proper approach when an employee speaks critically about the administration of his own government employer. In *Givhan* v. *Western Line Consol. School Dist.*, 439 U. S. 410 (1979), we followed *Pickering* when a teacher was fired for complaining to a superior about the racial composition of the school's administrative, cafeteria, and library staffs, 439 U. S., at 413–414, and the same point was clear in *Madison Joint School Dist. No. 8* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167 (1976). That case was decided, in part, with reference to the *Pickering* framework, and the Court there held that a schoolteacher speaking out on behalf of himself and others at a public school board meeting could not be penalized for criticizing pending collective-bargaining negotiations affecting professional employment. *Madison* noted that the teacher "addressed the school board not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government." 429

U. S., at 174–175. In each case, the Court realized that a public employee can wear a citizen's hat when speaking on subjects closely tied to the employee's own job, and *Givhan* stands for the same conclusion even when the speech is not addressed to the public at large. Cf. *Pegram* v. *Herdrich*, 530 U. S. 211, 225 (2000) (recognizing that, factually, a trustee under the Employee Retirement Income Security Act of 1974 can both act as ERISA fiduciary and act on behalf of the employer).

The difference between a case like *Givhan* and this one is that the subject of Ceballos's speech fell within the scope of his job responsibilities, whereas choosing personnel was not what the teacher was hired to do. The effect of the majority's constitutional line between these two cases, then, is that a *Givhan* schoolteacher is protected when complaining to the principal about hiring policy, but a school personnel officer would not be if he protested that the principal disapproved of hiring minority job applicants. This is an odd place to draw a distinction,[1] and while necessary judicial line-drawing sometimes looks arbitrary, any distinction obliges a court to justify its choice. Here, there is no adequate justification for the majority's line categorically denying *Pickering* protection to any speech uttered "pursuant to . . . official duties," *ante*, at 421.

As all agree, the qualified speech protection embodied in *Pickering* balancing resolves the tension between individual and public interests in the speech, on the one hand, and the government's interest in operating efficiently without distraction or embarrassment by talkative or headline-grabbing employees. The need for a balance hardly disappears when an employee speaks on matters his job requires him to address; rather, it seems obvious that the individual and public value of such speech is no less, and may well be greater, when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties.[2]

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[1] It seems stranger still in light of the majority's concession of some First Amendment protection when a public employee repeats statements made pursuant to his duties but in a separate, public forum or in a letter to a newspaper. *Ante*, at 423–424.

As for the importance of such speech to the individual, it stands to reason that a citizen may well place a very high value on a right to speak on the public issues he decides to make the subject of his work day after day. Would anyone doubt that a school principal evaluating the performance of teachers for promotion or pay adjustment retains a citizen's interest in addressing the quality of teaching in the schools? (Still, the majority indicates he could be fired without First Amendment recourse for fair but unfavorable comment when the teacher under review is the superintendent's daughter.) Would anyone deny that a prosecutor like Richard Ceballos may claim the interest of any citizen in speaking out against a rogue law enforcement officer, simply because his job requires him to express a judgment about the officer's performance? (But the majority says the First Amendment gives Ceballos no protection, even if his judgment in this case was sound and appropriately expressed.)

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[2] I do not say the value of speech "pursuant to . . . duties" will always be greater, because I am pessimistic enough to expect that one response to the Court's holding will be moves by government employers to expand stated job descriptions to include more official duties and so exclude even some currently protectable speech from First Amendment purview. Now that the government can freely penalize the school personnel officer for criticizing the principal because speech on the subject falls within the personnel officer's job responsibilities, the government may well try to limit the English teacher's options by the simple expedient of defining teachers' job responsibilities expansively, investing them with a general obligation to ensure sound administration of the school. Hence today's rule presents the regrettable prospect that protection under *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968), may be diminished by expansive statements of employment duties.

The majority's response, that the enquiry to determine duties is a "practical one," *ante*, at 424, does not alleviate this concern. It sets out a standard that will not discourage government employers from setting duties expansively, but will engender litigation to decide which stated duties were actual and which were merely formal.

Indeed, the very idea of categorically separating the citizen's interest from the employee's interest ignores the fact that the ranks of public service include those who share the poet's "object . . . to unite [m]y avocation and my vocation";[3] these citizen servants are the ones whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract.[4] There is no question that public employees speaking on matters they are obliged to address would generally place a high value on a right to speak, as any responsible citizen would.

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[3] R. Frost, Two Tramps in Mud Time, Collected Poems, Prose, & Plays 251, 252 (R. Poirier & M. Richardson eds. 1995).

[4] Not to put too fine a point on it, the Human Resources Division of the Los Angeles County District Attorney's Office, Ceballos's employer, is telling anyone who will listen that its work "provides the personal satisfaction and fulfillment that comes with knowing you are contributing essential services to the citizens of Los Angeles County." Career Opportunities, http://da.co.la.ca.us/hr/default.htm (all Internet materials as visited May 25, 2006, and available in Clerk of Court's case file).

The United States expresses the same interest in identifying the individual ideals of a citizen with its employees' obligations to the Government. See Brief as *Amicus Curiae* 25 (stating that public employees are motivated to perform their duties "to serve the public"). Right now, for example, the U. S. Food and Drug Administration is appealing to physicians, scientists, and statisticians to work in the Center for Drug Evaluation and Research, with the message that they "can give back to [their] community, state, and country by making a difference in the lives of Americans everywhere." Career Opportunities at CDER: You Can Make a Difference, http://www.fda.gov/cder/career/default.htm. Indeed, the Congress of the United States, by concurrent resolution, has previously expressly endorsed respect for a citizen's obligations as the prime responsibility of Government employees: "Any person in Government Service should: . . . [p]ut loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department," and shall "[e]xpose corruption wherever discovered," Code of Ethics for Government Service, H. Con. Res. 175, 85th Cong., 2d Sess. (1958), 72 Stat. B12. Display of this Code in Government buildings was once required by law, 94 Stat. 855; this obligation has been repealed, Office of Government Ethics Authorization Act of 1996, Pub. L. 104–179, § 4, 110 Stat. 1566.

Nor is there any reason to raise the counterintuitive question whether the public interest in hearing informed employees evaporates when they speak as required on some subject at the core of their jobs. Last Term, we recalled the public value that the *Pickering* Court perceived in the speech of public employees as a class: "Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *San Diego* v. *Roe*, 543 U. S. 77, 82 (2004) *(per curiam)* (citation omitted). This is not a whit less true when an employee's job duties require him to speak about such things: when, for example, a public auditor speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory report of an attempt to bribe him, or when a law enforcement officer expressly balks at a superior's order to violate constitutional rights he is sworn to protect. (The majority, however, places all these speakers beyond the reach of First Amendment protection against retaliation.)

Nothing, then, accountable on the individual and public side of the *Pickering* balance changes when an employee speaks "pursuant" to public duties. On the side of the government employer, however, something is different, and to this extent, I agree with the majority of the Court. The majority is rightly concerned that the employee who speaks out on matters subject to comment in doing his own work has the greater leverage to create office uproars and fracture the government's authority to set policy to be carried out coherently through the ranks. "Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." *Ante,* at 422–423. Up to a point, then, the majority makes good points: government needs civility in the workplace, consistency in policy, and honesty and competence in public service.

But why do the majority's concerns, which we all share, require categorical exclusion of First Amendment protection against any official retaliation for things said on the job? Is it not possible to respect the unchallenged individual and public interests in the speech through a *Pickering* balance without drawing the strange line I mentioned before, *supra,* at 430? This is, to be sure, a matter of judgment, but the judgment has to account for the undoubted value of speech to those, and by those, whose specific public job responsibilities bring them face to face with wrongdoing and incompetence in government, who refuse to avert their eyes and shut their mouths. And it has to account for the need actually to disrupt government if its officials are corrupt or dangerously incompetent. See n. 4, *supra.* It is thus no adequate justification for the suppression of potentially valuable information simply to recognize that the government has a huge interest in managing its employees and preventing the occasionally irresponsible one from turning his job into a bully pulpit. Even there, the lesson of *Pickering* (and the object of most constitutional adjudication) is still to the point: when constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake.

Two reasons in particular make me think an adjustment using the basic *Pickering* balancing scheme is perfectly feasible here. First, the extent of the government's legitimate authority over subjects of speech required by a public job can be recognized in advance by setting in effect a minimum heft for comments with any claim to outweigh it. Thus, the risks to the government are great enough for us to hold from the outset that an employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it. The examples I have already given indicate the eligible subject matter, and it is fair to say that only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor. If promulgation of this standard should fail to discourage meritless actions premised on 42 U. S. C. § 1983 (or *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971)) before they get filed, the standard itself would sift them out at the summary-judgment stage.[5]

My second reason for adapting *Pickering* to the circumstances at hand is the experience in Circuits that have recognized claims like Ceballos's here. First Amendment protection less circumscribed than what I would recognize has been available in the Ninth Circuit for over 17 years, and neither there nor in other Circuits that accept claims like this one has there been a debilitating flood of litigation. There has indeed been some: as represented by Ceballos's lawyer at oral argument, each year over the last five years, approximately 70 cases in the different Courts of Appeals and approximately 100 in the various District Courts. Tr. of Oral Arg. 58–59. But even these figures reflect a readiness to litigate that might well have been cooled by my view about the importance required before *Pickering* treatment is in order.

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[5] As I also said, a public employer is entitled (and obliged) to impose high standards of honesty, accuracy, and judgment on employees who speak in doing their work. These criteria are not, however, likely to discourage meritless litigation or provide a handle for summary judgment. The employee who has spoken out, for example, is unlikely to blame himself for prior bad judgment before he sues for retaliation.

For that matter, the majority's position comes with no guarantee against factbound litigation over whether a public employee's statements were made "pursuant to . . . official duties," *ante,* at 421. In fact, the majority invites such litigation by describing the enquiry as a "practical one," *ante,* at 424, apparently based on the totality of employment circumstances.[6] See n. 2, *supra.* Are prosecutors' discretionary statements about cases addressed to the press on the courthouse steps made "pursuant to their official duties"? Are government nuclear scientists' complaints to their supervisors about a colleague's improper handling of radioactive materials made "pursuant" to duties?

## II

The majority seeks support in two lines of argument extraneous to *Pickering* doctrine. The one turns on a fallacious reading of cases on government speech, the other on a mistaken assessment of protection available under whistleblower statutes.

### A

The majority accepts the fallacy propounded by the county petitioners and the Federal Government as *amicus* that any statement made within the scope of public employment is (or should be treated as) the government's own speech, see *ante,* at 421–422, and should thus be differentiated as a matter of law from the personal statements the First Amendment protects, see *Broadrick* v. *Oklahoma,* 413 U. S. 601, 610 (1973). The majority invokes the interpretation set out in *Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U. S. 819 (1995), of *Rust* v. *Sullivan,* 500 U. S. 173 (1991), which held there was no infringement of the speech rights of Title X funds recipients and their staffs when the Government forbade any on-the-job counseling in favor of abortion as a method of family planning, *id.*, at 192–200. We have read *Rust* to mean that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger, supra,* at 833.

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[6] According to the majority's logic, the litigation it encourages would have the unfortunate result of "demand[ing] permanent judicial intervention in the conduct of governmental operations," *ante,* at 423.

The key to understanding the difference between this case and *Rust* lies in the terms of the respective employees' jobs and, in particular, the extent to which those terms require espousal of a substantive position prescribed by the government in advance. Some public employees are hired to "promote a particular policy" by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto. See *Legal Services Corporation* v. *Velazquez,* 531 U. S. 533, 542 (2001). There is no claim or indication that Ceballos was hired to perform such a speaking assignment. He was paid to enforce the law by constitutional action: to exercise the county government's prosecutorial power by acting honestly, competently, and constitutionally. The only sense in which his position apparently required him to hew to a substantive message was at the relatively abstract point of favoring respect for law and its evenhanded enforcement, subjects that are not at the level of controversy in this case and were not in *Rust.* Unlike the doctors in *Rust,* Ceballos was not paid to advance one specific policy among those legitimately available, defined by a specific message or limited by a particular message forbidden. The county government's interest in his speech cannot therefore be equated with the terms of a specific, prescribed, or forbidden substantive position comparable to the Federal Government's interest in *Rust,* and *Rust* is no authority for the notion that government may exercise plenary control over every comment made by a public employee in doing his job.

It is not, of course, that the district attorney lacked interest of a high order in what Ceballos might say. If his speech undercut effective, lawful prosecution, there would have been every reason to rein him in or fire him; a statement that created needless tension among law enforcement agencies would be a fair subject of concern, and the same would be true of inaccurate statements or false ones made in the course of doing his work. But these interests on the government's part are entirely distinct from any claim that Ceballos's speech was government speech with a preset or proscribed content as exemplified in *Rust*. Nor did the county petitioners here even make such a claim in their answer to Ceballos's complaint, see n. 13, *infra*.

The fallacy of the majority's reliance on *Rosenberger*'s understanding of *Rust* doctrine, moreover, portends a bloated notion of controllable government speech going well beyond the circumstances of this case. Consider the breadth of the new formulation:

> "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Ante*, at 421–422.

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to . . . official duties." See *Grutter* v. *Bollinger*, 539 U. S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition"); *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'" (quoting *Shelton* v. *Tucker*, 364 U. S. 479, 487 (1960))); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957) (a governmental enquiry into the contents of a scholar's lectures at a state university "unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread").

### B

The majority's second argument for its disputed limitation of *Pickering* doctrine is that the First Amendment has little or no work to do here owing to an assertedly comprehensive complement of state and national statutes protecting government whistle-blowers from vindictive bosses. See *ante*, at 425–426. But even if I close my eyes to the tenet that "'[t]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law,'" *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668, 680 (1996), the majority's counsel to rest easy fails on its own terms.[7]

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[7] Even though this Court has recognized that 42 U. S. C. § 1983 "does not authorize a suit for every alleged violation of federal law," *Livadas* v. *Bradshaw*, 512 U. S. 107, 132 (1994), the rule is that "§ 1983 remains a generally and presumptively available remedy for claimed violations of federal law," *id.*, at 133. Individual enforcement under § 1983 is rendered unavailable for alleged violations of federal law when the underlying statutory provision is part of a federal statutory scheme clearly incompatible with individual enforcement under § 1983. See *Rancho Palos Verdes* v. *Abrams*, 544 U. S. 113, 119–120 (2005).

To begin with, speech addressing official wrongdoing may well fall outside protected whistle-blowing, defined in the classic sense of exposing an official's fault to a third party or to the public; the teacher in *Givhan,* for example, who raised the issue of unconstitutional hiring bias, would not have qualified as that sort of whistle-blower, for she was fired after a private conversation with the school principal. In any event, the combined variants of statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief. See D. Westman & N. Modesitt, Whistleblowing: Law of Retaliatory Discharge 67–75, 281–307 (2d ed. 2004). Some state statutes protect all government workers, including the employees of municipalities and other subdivisions;[8] others stop at state employees.[9] Some limit protection to employees who tell their bosses before they speak out;[10] others forbid bosses from imposing any requirement to warn.[11] As for the federal Whistleblower Protection Act of 1989, 5

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[8] Del. Code Ann., Tit. 29, § 5115 (2003); Fla. Stat. § 112.3187 (2003); Haw. Rev. Stat. § 378–61 (1993); Ky. Rev. Stat. Ann. § 61.101 (West 2005); Mass. Gen. Laws, ch. 149, § 185 (West 2004); Nev. Rev. Stat. § 281.611 (2003); N. H. Rev. Stat. Ann. § 275–E:1 (Supp. 2005); Ohio Rev. Code Ann. § 4113.51 (Lexis 2001); Tenn. Code Ann. § 50–1–304 (2005).

[9] Ala. Code § 36–26A–1 *et seq.* (2001); Colo. Rev. Stat. § 24–50.5–101 *et seq.* (2004); Iowa Code § 70A.28 *et seq.* (2005); Kan. Stat. Ann. § 75–2973 (2003 Cum. Supp.); Mo. Rev. Stat. § 105.055 (2004 Cum. Supp.); N. C. Gen. Stat. Ann. § 126–84 (Lexis 2003); Okla. Stat., Tit. 74, § 840–2.5 *et seq.* (West Supp. 2005); Wash. Rev. Code § 42.40.010 (2004); Wyo. Stat. Ann. § 9–11–102 (2003).

[10] Idaho Code § 6–2104(1)(a) (Lexis 2004); Me. Rev. Stat. Ann., Tit. 26, § 833(2) (1988); Mass. Gen. Laws, ch. 149, § 185(c)(1) (West 2004); N. H. Rev. Stat. Ann. § 275–E:2(II) (1999); N. J. Stat. Ann. § 34:19–4 (West 2000); N. Y. Civ. Serv. Law Ann. § 75–b(2)(b) (West 1999); Wyo. Stat. Ann. § 9–11–103(b) (2003).

[11] Kan. Stat. Ann. § 75–2973(d)(2) (2003 Cum. Supp.); Ky. Rev. Stat. Ann. § 61.102(1) (West 2005); Mo. Rev. Stat. § 105.055(2) (2004 Cum. Supp.); Okla. Stat., Tit. 74, § 840–2.5(B)(4) (West 2005 Supp.); Ore. Rev. Stat. § 659A.203(1)(c) (2003).

U. S. C. §1213 *et seq.* (2000 ed. and Supp. III), current case law requires an employee complaining of retaliation to show that " 'a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [could] reasonably conclude that the actions of the government evidence gross mismanagement,' " *White* v. *Department of Air Force*, 391 F. 3d 1377, 1381 (CA Fed. 2004) (quoting *Lachance* v. *White*, 174 F. 3d 1378, 1381 (CA Fed. 1999), cert. denied, 528 U. S. 1153 (2000)). And federal employees have been held to have no protection for disclosures made to immediate supervisors, see *Willis* v. *Department of Agriculture*, 141 F. 3d 1139, 1143 (CA Fed. 1998); *Horton* v. *Department of Navy*, 66 F. 3d 279, 282 (CA Fed. 1995), cert. denied, 516 U. S. 1176 (1996), or for statements of facts publicly known already, see *Francisco* v. *Office of Personnel Management*, 295 F. 3d 1310, 1314 (CA Fed. 2002). Most significantly, federal employees have been held to be unprotected for statements made in connection with normal employment duties, *Huffman* v. *Office of Personnel Management*, 263 F. 3d 1341, 1352 (CA Fed. 2001), the very speech that the majority says will be covered by "the powerful network of legislative enactments . . . available to those who seek to expose wrongdoing," *ante*, at 425.[12] My point is not to disparage particular statutes or speak here to the merits of interpretations by other federal courts, but merely to show the current understanding of statutory protection: individuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them.

## III

The Court remands because the Court of Appeals considered only the disposition memorandum and because Ceballos charges retaliation for some speech apparently outside the ambit of utterances "pursuant to their official duties." When the Court of Appeals takes up this case once again, it should consider some of the following facts that escape emphasis in the majority opinion owing to its focus.[13] Ceballos says he sought his position out of a personal commitment to perform civic work. After showing his superior, petitioner Frank Sundstedt, the disposition memorandum at issue in this case, Ceballos complied with Sundstedt's direction to tone down some accusatory rhetoric out of concern that the memorandum would be unnecessarily incendiary when shown to the Sheriff's Department. After meeting with members of that department, Ceballos told his immediate supervisor, petitioner Carol Najera, that he thought *Brady* v. *Maryland*, 373 U. S. 83 (1963), obliged him to give the defense his internal memorandum as exculpatory evidence. He says that Najera responded by ordering him to write a new memorandum containing nothing but the deputy sheriff's statements, but that he balked at that. Instead, he proposed to turn over the existing memorandum with his own conclusions redacted as work product, and this is what he did. The issue over revealing his conclusions arose again in preparing for the suppression hearing. Ceballos maintains that Sundstedt ordered Najera, representing the prosecution, to give the trial judge a full picture of the circumstances, but that Najera told Ceballos he would suffer retaliation if he testified that the affidavit contained intentional fabrications. In any event, Ceballos's testimony generally stopped short of his own conclusions. After the hearing, the trial judge denied the motion to suppress, explaining that he found grounds independent of the challenged material sufficient to show probable cause for the warrant.

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[12] See n. 4, *supra*.

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[13] This case comes to the Court on the motions of petitioners for summary judgment, and as such, "[t]he evidence of [Ceballos] is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 255 (1986).

Ceballos says that over the next six months his supervisors retaliated against him[14] not only for his written reports, see *ante*, at 415, but also for his spoken statements to them and his hearing testimony in the pending criminal case. While an internal grievance filed by Ceballos challenging these actions was pending, Ceballos spoke at a meeting of the Mexican-American Bar Association about misconduct of the Sheriff's Department in the criminal case, the lack of any policy at the District Attorney's Office for handling allegations of police misconduct, and the retaliatory acts he ascribed to his supervisors. Two days later, the office dismissed Ceballos's grievance, a result he attributes in part to his bar association speech.

Ceballos's action against petitioners under 42 U. S. C. § 1983 claims that the individuals retaliated against him for exercising his First Amendment rights in submitting the memorandum, discussing the matter with Najera and Sundstedt, testifying truthfully at the hearing, and speaking at the bar meeting.[15] As I mentioned, the Court of Appeals saw no need to address the protection afforded to Ceballos's statements other than the disposition memorandum, which it thought was protected under the *Pickering* test. Upon remand, it will be open to the Court of Appeals to consider the application of *Pickering* to any retaliation shown for other statements; not all of those statements would have been made pursuant to official duties in any obvious sense, and the claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process.

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[14] Sundstedt demoted Ceballos to a trial deputy; his only murder case was reassigned to a junior colleague with no experience in homicide matters, and no new murder cases were assigned to him; then-District Attorney Gil Garcetti, relying in part on Sundstedt's recommendation, denied Ceballos a promotion; finally, Sundstedt and Najera transferred him to the office's El Monte Branch, requiring longer commuting. Before transferring Ceballos, Najera offered him a choice between transferring and remaining at the Pomona Branch prosecuting misdemeanors instead of felonies. When Ceballos refused to choose, Najera transferred him.

[15] The county petitioners' position on these claims is difficult to follow or, at least, puzzling. In their motion for summary judgment, they denied that any of their actions was responsive to Ceballos's criticism of the sheriff's affidavit. *E. g.*, App. 159–160, 170–172 (maintaining that Ceballos was transferred to the El Monte Branch because of the decreased workload in the Pomona Branch and because he was next in a rotation to go there to serve as a "filing deputy"); *id.*, at 160, 172–173 (contending that Ceballos's murder case was reassigned to a junior colleague to give that attorney murder trial experience before he was transferred to the Juvenile Division of the District Attorney's Office); *id.*, at 161–162, 173–174 (arguing that

JUSTICE BREYER, dissenting.

This case asks whether the First Amendment protects public employees when they engage in speech that both (1) involves matters of public concern and (2) takes place in the ordinary course of performing the duties of a government job. I write separately to explain why I cannot fully accept either the Court's or JUSTICE SOUTER's answer to the question presented.

## I

I begin with what I believe is common ground:

(1) Because virtually all human interaction takes place through speech, the First Amendment cannot offer all speech the same degree of protection. Rather, judges must apply different protective presumptions in different contexts, scrutinizing government's speech-related restrictions differently

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Ceballos was denied a promotion by Garcetti despite Sundstedt's stellar review of Ceballos, when Garcetti was unaware of the matter in *People* v. *Cuskey*, the criminal case for which Ceballos wrote the pertinent disposition memorandum). Their reply to Ceballos's opposition to summary judgment, however, shows that petitioners argued for a *Pickering* assessment (for want of a holding that Ceballos was categorically disentitled to any First Amendment protection) giving great weight in their favor to workplace disharmony and distrust caused by Ceballos's actions. *E. g.*, App. 477–478.

depending upon the general category of activity. Compare, *e. g., Burson* v. *Freeman*, 504 U. S. 191 (1992) (plurality opinion) (political speech), with *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980) (commercial speech), and *Rust* v. *Sullivan*, 500 U. S. 173 (1991) (government speech).

(2) Where the speech of government employees is at issue, the First Amendment offers protection only where the offer of protection itself will not unduly interfere with legitimate governmental interests, such as the interest in efficient administration. That is because the government, like any employer, must have adequate authority to direct the activities of its employees. That is also because efficient administration of legislatively authorized programs reflects the constitutional need effectively to implement the public's democratically determined will.

(3) Consequently, where a government employee speaks "as an employee upon matters only of personal interest," the First Amendment does not offer protection. *Connick* v. *Myers*, 461 U. S. 138, 147 (1983). Where the employee speaks "as a citizen . . . upon matters of public concern," the First Amendment offers protection but only where the speech survives a screening test. *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968). That test, called, in legal shorthand, "*Pickering* balancing," requires a judge to "balance . . . the interests" of the employee "in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.* See also *Connick, supra,* at 142.

(4) Our prior cases do not decide what screening test a judge should apply in the circumstances before us, namely, when the government employee both speaks upon a matter of public concern and does so in the course of his ordinary duties as a government employee.

## II

The majority answers the question by holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Ante,* at 421. In a word, the majority says, "never." That word, in my view, is too absolute.

Like the majority, I understand the need to "affor[d] government employers sufficient discretion to manage their operations." *Ante,* at 422. And I agree that the Constitution does not seek to "displac[e] . . . managerial discretion by judicial supervision." *Ante,* at 423. Nonetheless, there may well be circumstances with special demand for constitutional protection of the speech at issue, where governmental justifications may be limited, and where administrable standards seem readily available—to the point where the majority's fears of department management by lawsuit are misplaced. In such an instance, I believe that courts should apply the *Pickering* standard, even though the government employee speaks upon matters of public concern in the course of his ordinary duties.

This is such a case. The respondent, a government lawyer, complained of retaliation, in part, on the basis of speech contained in his disposition memorandum that he says fell within the scope of his obligations under *Brady* v. *Maryland,* 373 U. S. 83 (1963). The facts present two special circumstances that together justify First Amendment review.

First, the speech at issue is professional speech—the speech of a lawyer. Such speech is subject to independent regulation by canons of the profession. Those canons provide an obligation to speak in certain instances. And where that is so, the government's own interest in forbidding that speech is diminished. Cf. *Legal Services Corporation* v. *Velazquez,* 531 U. S. 533, 544 (2001) ("Restricting LSC [Legal Services Corporation] attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys"). See also *Polk County* v. *Dodson*, 454 U. S. 312, 321 (1981) ("[A] public defender is not amenable to administrative direction in the same sense as other employees of the State"). See generally Post, Subsidized Speech, 106 Yale L. J. 151, 172 (1996) ("[P]rofessionals must always qualify their loyalty and commitment to the vertical hierarchy of an organization by their horizontal commitment to general professional norms and standards"). The objective specificity and public availability of the profession's canons also help to diminish the risk that the courts will improperly interfere with the government's necessary authority to manage its work.

Second, the Constitution itself here imposes speech obligations upon the government's professional employee. A prosecutor has a constitutional obligation to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government's possession. *Kyles* v. *Whitley*, 514 U. S. 419, 437 (1995); *Brady*, *supra*. So, for example, might a prison doctor have a similar constitutionally related professional obligation to communicate with superiors about seriously unsafe or unsanitary conditions in the cellblock. Cf. *Farmer* v. *Brennan*, 511 U. S. 825, 832 (1994). There may well be other examples.

Where professional and special constitutional obligations are both present, the need to protect the employee's speech is augmented, the need for broad government authority to control that speech is likely diminished, and administrable standards are quite likely available. Hence, I would find that the Constitution mandates special protection of employee speech in such circumstances. Thus I would apply the *Pickering* balancing test here.

## III

While I agree with much of JUSTICE SOUTER's analysis, I believe that the constitutional standard he enunciates fails to give sufficient weight to the serious managerial and administrative concerns that the majority describes. The standard would instruct courts to apply *Pickering* balancing in all cases, but says that the government should prevail unless the employee (1) "speaks on a matter of unusual importance," and (2) "satisfies high standards of responsibility in the way he does it." *Ante,* at 435 (dissenting opinion). JUSTICE SOUTER adds that "only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor." *Ibid.*

There are, however, far too many issues of public concern, even if defined as "matters of unusual importance," for the screen to screen out very much. Government administration typically involves matters of public concern. Why else would government be involved? And "public issues," indeed, matters of "unusual importance," are often daily bread-and-butter concerns for the police, the intelligence agencies, the military, and many whose jobs involve protecting the public's health, safety, and the environment. This aspect of JUSTICE SOUTER's "adjustment" of "the basic *Pickering* balancing scheme," *ante,* at 434, is similar to the Court's present insistence that speech be of "legitimate news interest" when the employee speaks only as a private citizen, see *San Diego* v. *Roe,* 543 U. S. 77, 83–84 (2004) *(per curiam).* It gives no extra weight to the government's augmented need to direct speech that is an ordinary part of the employee's job-related duties.

Moreover, the speech of vast numbers of public employees deals with wrongdoing, health, safety, and honesty: for example, police officers, firefighters, environmental protection agents, building inspectors, hospital workers, bank regulators, and so on. Indeed, this categorization could encompass speech by an employee performing almost any public function, except perhaps setting electricity rates. Nor do these categories bear any obvious relation to the constitutional importance of protecting the job-related speech at issue.

The underlying problem with this breadth of coverage is that the standard (despite predictions that the government is likely to *prevail* in the balance unless the speech concerns "official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety," *ante*, at 435 (SOUTER, J., dissenting)) does not avoid the judicial need to *undertake the balance* in the first place. And this form of judicial activity—the ability of a dissatisfied employee to file a complaint, engage in discovery, and insist that the court undertake a balancing of interests—itself may interfere unreasonably with both the managerial function (the ability of the employer to control the way in which an employee performs his basic job) and with the use of other grievance-resolution mechanisms, such as arbitration, civil service review boards, and whistle-blower remedies, for which employees and employers may have bargained or which legislatures may have enacted.

At the same time, the list of categories substantially overlaps areas where the law already provides nonconstitutional protection through whistle-blower statutes and the like. See *ante*, at 425–426 (majority opinion); *ante*, at 439–441 (SOUTER, J., dissenting). That overlap diminishes the need for a constitutional forum and also means that adoption of the test would authorize Federal Constitution-based legal actions that threaten to upset the legislatively struck (or administratively struck) balance that those statutes (or administrative procedures) embody.

## IV

I conclude that the First Amendment sometimes does authorize judicial actions based upon a government employee's speech that both (1) involves a matter of public concern and also (2) takes place in the course of ordinary job-related duties. But it does so only in the presence of augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs. In my view, these conditions are met in this case and *Pickering* balancing is consequently appropriate.

With respect, I dissent.

# ANZA ET AL. *v.* IDEAL STEEL SUPPLY CORP.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 04–433. Argued March 27, 2006—Decided June 5, 2006

The Racketeer Influenced and Corrupt Organizations Act (RICO) prohibits certain conduct involving a "pattern of racketeering activity," 18 U. S. C. § 1962, and makes a private right of action available to "[a]ny person injured in his business or property by reason of a violation" of RICO's substantive restrictions, § 1964(c), provided that the alleged violation was the proximate cause of the injury, *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268. Respondent Ideal Steel Supply Corporation (Ideal) has stores in Queens and the Bronx. Petitioner National Steel Supply, Inc. (National), owned by petitioners Joseph and Vincent Anza, has stores in the same locations and is Ideal's principal competitor. Ideal filed suit in the District Court, claiming that National failed to charge New York's sales tax to cash-paying customers, allowing it to reduce its prices without affecting its profit margin; and that it submitted fraudulent state tax returns to conceal the conduct, which involved committing mail and wire fraud, both forms of "racketeering activity" under RICO. Ideal alleged that the Anzas violated § 1962(c), which forbids conducting or participating in the conduct of an enterprise's affairs through a pattern of racketeering activity. It also claimed that all the petitioners violated § 1962(a)—which makes it unlawful for a person "to use or invest" income derived from a pattern of racketeering activity in an enterprise engaged in or affecting interstate or foreign commerce—when they used funds generated by the fraudulent tax scheme to open National's Bronx location, causing Ideal to lose business and market share. The District Court granted petitioners' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), concluding that Ideal had not shown reliance on petitioners' misrepresentations, as required in RICO mail and wire fraud claims. Vacating, the Second Circuit held, with regard to the § 1962(c) claim, that a complaint alleging a pattern of racketeering activity designed to give a defendant a competitive advantage adequately pleaded proximate cause even where the scheme depended on fraudulent communications made to a third party; and held that Ideal adequately pleaded its § 1962(a) claim by alleging injury resulting from petitioners' use and investment of racketeering proceeds.

*Held:*

1. Ideal cannot maintain its § 1962(c) claim. Under *Holmes,* proximate cause for § 1964(c) purposes requires "some direct relation between the injury asserted and the injurious conduct alleged." 503 U. S., at 268. The direct victim of the alleged RICO violation is the State of New York, not Ideal. Ideal's claim is too attenuated to satisfy *Holmes'* requirement of directness. This result is confirmed by the directness requirement's underlying premises, one of which is the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action. Ideal claims lost sales because of National's decreased prices, but National could have lowered prices for reasons unrelated to the asserted tax fraud, and Ideal's lost sales could have resulted from other factors as well. The attenuated connection between Ideal's injury and the Anzas' injurious conduct thus implicates fundamental concerns expressed in *Holmes.* Further illustrating the absence of proximate cause is the speculative nature of the proceedings that would follow if Ideal were permitted to maintain its claim. A court would have to calculate the portion of National's price drop attributable to the pattern of racketeering activity and then calculate the portion of lost sales attributable to the relevant part of the price drop, but *Holmes'* proximate causation element was meant to prevent such intricate, uncertain inquiries from overrunning RICO litigation. A direct causal connection is especially warranted where the immediate victims can be expected to vindicate the laws by pursuing their own claims. Contrary to the Second Circuit's rationale, a RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense. Because Ideal has not satisfied that requirement, this Court has no occasion to address the substantial question whether a plaintiff asserting a RICO claim predicated on mail or wire fraud must show that it relied on the defendant's misrepresentations. Pp. 456–461.

2. The Second Circuit's judgment with respect to Ideal's § 1962(a) claim is vacated so that court can determine on remand whether petitioners' alleged § 1962(a) violation proximately caused Ideal's asserted injuries. Pp. 461–462.

373 F. 3d 251, reversed in part, vacated in part, and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, SOUTER, GINSBURG, and ALITO, JJ., joined, and in which THOMAS, J., joined as to Part III. SCALIA, J., filed a concurring opinion, *post,* p. 462. THOMAS, J., *post,* p. 463, and BREYER, J., *post,* p. 479, filed opinions concurring in part and dissenting in part.

*David C. Frederick* argued the cause for petitioners. With him on the briefs were *Richard L. Huffman, William M. Brodsky,* and *V. David Rivkin.*

*Kevin P. Roddy* argued the cause and filed a brief for respondent.*

JUSTICE KENNEDY delivered the opinion of the Court.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§1961–1968 (2000 ed. and Supp. III), prohibits certain conduct involving a "pattern of racketeering activity." §1962 (2000 ed.). One of RICO's enforcement mechanisms is a private right of action, available to "[a]ny person injured in his business or property by reason of a violation" of RICO's substantive restrictions. §1964(c). In *Holmes* v. *Securities Investor Protection Corporation,* 503 U. S. 258, 268 (1992), this Court held that a plaintiff may sue under §1964(c) only if the alleged RICO violation was the proximate cause of the plaintiff's injury. The instant case requires us to apply the principles discussed in *Holmes* to a dispute between two competing businesses.

## I

Because this case arises from a motion to dismiss, we accept as true the factual allegations in the amended complaint. See *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U. S. 163, 164 (1993).

Respondent Ideal Steel Supply Corporation (Ideal) sells steel mill products along with related supplies and services. It operates two store locations in New York, one in Queens and the other in the Bronx. Petitioner National Steel Supply, Inc. (National), owned by petitioners Joseph and Vincent Anza, is Ideal's principal competitor. National offers a similar array of products and services, and it, too, operates one store in Queens and one in the Bronx.

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**Gene C. Schaerr, Linda T. Coberly, Charles B. Klein, Robin S. Conrad,* and *Amar D. Sarwal* filed a brief for the Chamber of Commerce of the United States of America as *amicus curiae* urging reversal.

*Henry H. Rossbacher* and *G. Robert Blakey* filed a brief for the National Association of Shareholder and Consumer Attorneys as *amicus curiae* urging affirmance.

Ideal sued petitioners in the United States District Court for the Southern District of New York. It claimed petitioners were engaged in an unlawful racketeering scheme aimed at "gain[ing] sales and market share at Ideal's expense." App. 7. According to Ideal, National adopted a practice of failing to charge the requisite New York sales tax to cash-paying customers, even when conducting transactions that were not exempt from sales tax under state law. This practice allowed National to reduce its prices without affecting its profit margin. Petitioners allegedly submitted fraudulent tax returns to the New York State Department of Taxation and Finance in an effort to conceal their conduct.

Ideal's amended complaint contains, as relevant here, two RICO claims. The claims assert that petitioners, by submitting the fraudulent tax returns, committed various acts of mail fraud (when they sent the returns by mail) and wire fraud (when they sent them electronically). See 18 U. S. C. §§ 1341, 1343 (2000 ed., Supp. III). Mail fraud and wire fraud are forms of "racketeering activity" for purposes of RICO. § 1961(1)(B). Petitioners' conduct allegedly constituted a "pattern of racketeering activity," see § 1961(5) (2000 ed.), because the fraudulent returns were submitted on an ongoing and regular basis.

Ideal asserts in its first cause of action that Joseph and Vincent Anza violated § 1962(c), which makes it unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." The complaint states that the Anzas' goal, which they achieved, was to give National a competitive advantage over Ideal.

The second cause of action is asserted against all three petitioners. It alleges a violation of § 1962(a), which makes it unlawful for any person who has received income derived from a pattern of racketeering activity "to use or invest" that income "in acquisition of any interest in, or the establishment or operation of," an enterprise engaged in or affecting interstate or foreign commerce. As described in the complaint, petitioners used funds generated by their fraudulent tax scheme to open National's Bronx location. The opening of this new facility caused Ideal to lose "significant business and market share." App. 18.

Petitioners moved to dismiss Ideal's complaint under Federal Rules of Civil Procedure 12(b)(6) and 9(b). The District Court granted the Rule 12(b)(6) motion, holding that the complaint failed to state a claim upon which relief could be granted. The court began from the proposition that to assert a RICO claim predicated on mail fraud or wire fraud, a plaintiff must have relied on the defendant's misrepresentations. Ideal not having alleged that it relied on petitioners' false tax returns, the court concluded Ideal could not go forward with its RICO claims.

Ideal appealed, and the Court of Appeals for the Second Circuit vacated the District Court's judgment. 373 F. 3d 251 (2004). Addressing Ideal's § 1962(c) claim, the court held that where a complaint alleges a pattern of racketeering activity "that was intended to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause, and the plaintiff has standing to pursue a civil RICO claim." *Id.*, at 263. This is the case, the court explained, "even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff." *Ibid.*

The court reached the same conclusion with respect to Ideal's § 1962(a) claim. It reasoned that Ideal adequately pleaded its claim because it alleged an injury by reason of petitioners' use and investment of racketeering proceeds, "as distinct from injury traceable simply to the predicate acts of racketeering alone or to the conduct of the business of the enterprise." *Id.*, at 264.

We granted certiorari. 546 U. S. 1029 (2005).

## II

Our analysis begins—and, as will become evident, largely ends—with *Holmes.* That case arose from a complaint filed by the Securities Investor Protection Corporation (SIPC), a private corporation with a duty to reimburse the customers of registered broker-dealers who became unable to meet their financial obligations. SIPC claimed that the petitioner, Robert Holmes, conspired with others to manipulate stock prices. When the market detected the fraud, the share prices plummeted, and the "decline caused [two] broker-dealers' financial difficulties resulting in their eventual liquidation and SIPC's advance of nearly $13 million to cover their customers' claims." 503 U. S., at 262, 263. SIPC sued on several theories, including that Holmes participated in the conduct of an enterprise's affairs through a pattern of racketeering activity in violation of § 1962(c) and conspired to do so in violation of § 1962(d).

The Court held that SIPC could not maintain its RICO claims against Holmes for his alleged role in the scheme. The decision relied on a careful interpretation of § 1964(c), which provides a civil cause of action to persons injured "by reason of" a defendant's RICO violation. The Court recognized the phrase "by reason of" could be read broadly to require merely that the claimed violation was a "but for" cause of the plaintiff's injury. *Id.*, at 265–266. It rejected this reading, however, noting the "unlikelihood that Congress meant to allow all factually injured plaintiffs to recover." *Id.*, at 266.

Proper interpretation of § 1964(c) required consideration of the statutory history, which revealed that "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act." *Id.*, at 267. In *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519 (1983), the Court held that "a plaintiff's right to sue under § 4 required a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *Holmes, supra*, at 268 (citing *Associated Gen. Contractors, supra*, at 534). This reasoning, the Court noted in *Holmes*, "applies just as readily to § 1964(c)." 503 U. S., at 268.

The *Holmes* Court turned to the common-law foundations of the proximate-cause requirement, and specifically the "demand for some direct relation between the injury asserted and the injurious conduct alleged." *Ibid.* It concluded that even if SIPC were subrogated to the rights of certain aggrieved customers, the RICO claims could not satisfy this requirement of directness. The deficiency, the Court explained, was that "the link is too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers." *Id.*, at 271.

Applying the principles of *Holmes* to the present case, we conclude Ideal cannot maintain its claim based on § 1962(c). Section 1962(c), as noted above, forbids conducting or participating in the conduct of an enterprise's affairs through a pattern of racketeering activity. The Court has indicated the compensable injury flowing from a violation of that provision "necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise." *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 497 (1985).

Ideal's theory is that Joseph and Vincent Anza harmed it by defrauding the New York tax authority and using the proceeds from the fraud to offer lower prices designed to attract more customers. The RICO violation alleged by Ideal is that the Anzas conducted National's affairs through a pattern of mail fraud and wire fraud. The direct victim of this conduct was the State of New York, not Ideal. It was the State that was being defrauded and the State that lost tax revenue as a result.

The proper referent of the proximate-cause analysis is an alleged practice of conducting National's business through a pattern of defrauding the State. To be sure, Ideal asserts it suffered its own harms when the Anzas failed to charge customers for the applicable sales tax. The cause of Ideal's asserted harms, however, is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State). The attenuation between the plaintiff's harms and the claimed RICO violation arises from a different source in this case than in *Holmes,* where the alleged violations were linked to the asserted harms only through the broker-dealers' inability to meet their financial obligations. Nevertheless, the absence of proximate causation is equally clear in both cases.

This conclusion is confirmed by considering the directness requirement's underlying premises. See 503 U. S., at 269–270. One motivating principle is the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action. See *id.,* at 269 ("[T]he less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors"). The instant case is illustrative. The injury Ideal alleges is its own loss of sales resulting from National's decreased prices for cash-paying customers. National, however, could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud. It may have received a cash inflow from some other source or concluded that the additional sales would justify a smaller profit margin. Its lowering of prices in no sense required it to defraud the state tax authority. Likewise, the fact that a company commits tax fraud does not mean the company will lower its prices; the additional cash could go anywhere from asset acquisition to research and development to dividend payouts. Cf. *id.*, at 271 ("The broker-dealers simply cannot pay their bills, and only that intervening insolvency connects the conspirators' acts to the losses suffered by the nonpurchasing customers and general creditors").

There is, in addition, a second discontinuity between the RICO violation and the asserted injury. Ideal's lost sales could have resulted from factors other than petitioners' alleged acts of fraud. Businesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of Ideal's lost sales were the product of National's decreased prices. Cf. *id.*, at 272–273 ("If the nonpurchasing customers were allowed to sue, the district court would first need to determine the extent to which their inability to collect from the broker-dealers was the result of the alleged conspiracy to manipulate, as opposed to, say, the broker-dealers' poor business practices or their failures to anticipate developments in the financial markets").

The attenuated connection between Ideal's injury and the Anzas' injurious conduct thus implicates fundamental concerns expressed in *Holmes*. Notwithstanding the lack of any appreciable risk of duplicative recoveries, which is another consideration relevant to the proximate-cause inquiry, see *id.*, at 269, these concerns help to illustrate why Ideal's alleged injury was not the direct result of a RICO violation. Further illustrating this point is the speculative nature of the proceedings that would follow if Ideal were permitted to maintain its claim. A court considering the claim would need to begin by calculating the portion of National's price drop attributable to the alleged pattern of racketeering activity. It next would have to calculate the portion of Ideal's lost sales attributable to the relevant part of the price drop.

The element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation. It has particular resonance when applied to claims brought by economic competitors, which, if left unchecked, could blur the line between RICO and the antitrust laws.

The requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims. See *id.*, at 269–270 ("[D]irectly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely"). Again, the instant case is instructive. Ideal accuses the Anzas of defrauding the State of New York out of a substantial amount of money. If the allegations are true, the State can be expected to pursue appropriate remedies. The adjudication of the State's claims, moreover, would be relatively straightforward; while it may be difficult to determine facts such as the number of sales Ideal lost due to National's tax practices, it is considerably easier to make the initial calculation of how much tax revenue the Anzas withheld from the State. There is no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly.

The Court of Appeals reached a contrary conclusion, apparently reasoning that because the Anzas allegedly sought to gain a competitive advantage over Ideal, it is immaterial whether they took an indirect route to accomplish their goal. See 373 F. 3d, at 263. This rationale does not accord with *Holmes.* A RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense. See *Associated Gen. Contractors*, 459 U. S., at 537 ("We are also satisfied that an allegation of improper motive . . . is not a panacea that will enable any complaint to withstand a motion to dismiss"). When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries. In the instant case, the answer is no. We hold that Ideal's § 1962(c) claim does not satisfy the requirement of proximate causation.

Petitioners alternatively ask us to hold, in line with the District Court's decision granting petitioners' motion to dismiss, that a plaintiff may not assert a RICO claim predicated on mail fraud or wire fraud unless it demonstrates it relied on the defendant's misrepresentations. They argue that RICO's private right of action must be interpreted in light of common-law principles, and that at common law a fraud action requires the plaintiff to prove reliance. Because Ideal has not satisfied the proximate-cause requirement articulated in *Holmes*, we have no occasion to address the substantial question whether a showing of reliance is required. Cf. 503 U. S., at 275–276.

## III

The amended complaint also asserts a RICO claim based on a violation of § 1962(a). The claim alleges petitioners' tax scheme provided them with funds to open a new store in the Bronx, which attracted customers who otherwise would have purchased from Ideal.

In this Court petitioners contend that the proximate-cause analysis should function identically for purposes of Ideal's § 1962(c) claim and its § 1962(a) claim. (Petitioners also contend that "a civil RICO plaintiff does not plead an injury proximately caused by a violation of § 1962(a) merely by alleging that a corporate defendant reinvested profits back into itself," Brief for Petitioners 20, n. 5, but this argument has not been developed, and we decline to address it.) It is true that private actions for violations of § 1962(a), like actions for violations of § 1962(c), must be asserted under

§ 1964(c). It likewise is true that a claim is cognizable under § 1964(c) only if the defendant's alleged violation proximately caused the plaintiff's injury. The proximate-cause inquiry, however, requires careful consideration of the "relation between the injury asserted and the injurious conduct alleged." *Holmes, supra,* at 268. Because § 1962(c) and § 1962(a) set forth distinct prohibitions, it is at least debatable whether Ideal's two claims should be analyzed in an identical fashion for proximate-cause purposes.

The Court of Appeals held that Ideal adequately pleaded its § 1962(a) claim, see 373 F. 3d, at 264, but the court did not address proximate causation. We decline to consider Ideal's § 1962(a) claim without the benefit of the Court of Appeals' analysis, particularly given that the parties have devoted nearly all their attention in this Court to the § 1962(c) claim. We therefore vacate the Court of Appeals' judgment with respect to Ideal's § 1962(a) claim. On remand, the court should determine whether petitioners' alleged violation of § 1962(a) proximately caused the injuries Ideal asserts.

* * *

The judgment of the Court of Appeals is reversed in part and vacated in part. The case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE SCALIA, concurring.

I join the opinion of the Court. I also note that it is inconceivable that the injury alleged in the 18 U. S. C. § 1962(c) claim at issue here is within the zone of interests protected by the RICO cause of action for fraud perpetrated upon New York State. See *Holmes* v. *Securities Investor Protection Corporation,* 503 U. S. 258, 286–290 (1992) (SCALIA, J., concurring in judgment).

JUSTICE THOMAS, concurring in part and dissenting in part.

The Court today limits the lawsuits that may be brought under the civil enforcement provision of the Racketeer Influenced and Corrupt Organizations Act (RICO or Act), 18 U. S. C. § 1961 *et seq.* (2000 ed. and Supp. III), by adopting a theory of proximate causation that is supported neither by the Act nor by our decision in *Holmes* v. *Securities Investor Protection Corporation,* 503 U. S. 258, 268 (1992), on which the Court principally relies. The Court's stringent proximate-causation requirement succeeds in precluding recovery in cases alleging a violation of § 1962(c) that, like the present one, have nothing to do with organized crime, the target of the RICO statute. However, the Court's approach also eliminates recovery for plaintiffs whose injuries are precisely those that Congress aimed to remedy through the authorization of civil RICO suits. Because this frustration of congressional intent is directly contrary to the broad language Congress employed to confer a RICO cause of action, I respectfully dissent from Part II of the Court's opinion.

## I

The language of the civil RICO provision, which broadly permits recovery by "[a]ny person injured in his business or property by reason of a violation" of the Act's substantive restrictions, § 1964(c) (2000 ed.), plainly covers the lawsuit brought by respondent. Respondent alleges that it was injured in its business, and that this injury was the direct result of petitioners' violation of § 1962(c).[1] App. 12–17. In

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[1] Respondent also alleges that petitioners injured its business through a violation of § 1962(a), although the parties dedicate little attention to this issue. In light of the Court's disposition of the § 1962(c) claim and the limited discussion of § 1962(a) by the parties, I agree with the Court that we should give the Court of Appeals the first opportunity to reconsider the § 1962(a) claim. Accordingly, I join Part III of the Court's opinion.

*Holmes,* however, we held that a RICO plaintiff is required to show that the RICO violation "not only was a 'but for' cause of his injury, but was the proximate cause as well." 503 U. S., at 268. We employed the term "'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Ibid.* These tools reflect "'ideas of what justice demands, or of what is administratively possible and convenient.'" *Ibid.* (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p. 264 (5th ed. 1984) (hereinafter Prosser & Keeton)).

Invoking one of the common-law proximate-cause considerations, we held that a RICO plaintiff must prove "some direct relation between the injury asserted and the injurious conduct alleged." 503 U. S., at 268. Today the Court applies this formulation to conclude that the "attenuated relationship" between the violation of § 1962(c) and Ideal's injury "implicates fundamental concerns expressed in *Holmes*" and that the "absence of proximate causation is equally clear in both cases." *Ante,* at 459, 458. But the Court's determination relies on a theory of "directness" distinct from that adopted by *Holmes.*

In *Holmes,* the Court explained that "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." 503 U. S., at 268–269. The plaintiff in *Holmes* was indirect in precisely this sense. The defendant was alleged to have participated in a stock manipulation scheme that disabled two broker-dealers from meeting their obligations to customers. Accordingly, the plaintiff, Securities Investor Protection Corporation (SIPC), had to advance nearly $13 million to cover the claims of customers of those broker-dealers. SIPC attempted to sue based on the claim that it was subrogated to the rights of those customers of the broker-dealers who did not purchase manipulated securities. We held that the nonpurchasing customers' injury was not proximately caused by the defendant's conduct, because "the conspirators have allegedly injured these customers only insofar as the stock manipulation first injured the broker-dealers and left them without the wherewithal to pay customers' claims." *Id.*, at 271.[2]

Here, in contrast, it was not *New York's injury* that caused respondent's damages; rather, it was petitioners' own conduct—namely, their underpayment of tax—that permitted them to undercut respondent's prices and thereby take away its business. Indeed, the Court's acknowledgment that there is no appreciable risk of duplicative recovery here, in contrast to *Holmes*, *ante*, at 459, is effectively a concession that petitioners' damages are not indirect, as that term is used in *Holmes*. See 503 U. S., at 269 ("[R]ecognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries"). The mere fact that New York is a direct victim of petitioners' RICO violation does not preclude Ideal's claim that it too is a direct victim. Because the petitioners' tax underpayment directly caused respondent's injury, *Holmes* does not bar respondent's recovery.

The Court nonetheless contends that respondent has failed to demonstrate proximate cause. It does so by relying on our observation in *Holmes* that the directness requirement is appropriate because "'[t]he less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors.'" *Ante*, at 458 (quoting *Holmes, supra*, at 269, in turn, citing *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519 (1983)). In *Holmes*, we noted that it would be hard for the District Court to determine how much of the broker-dealers' failure to pay their customers was due to the fraud and how much was due to other factors affecting the broker-dealers' business success. 503 U. S., at 273–274. The Court contends that here, as in *Holmes*, it is difficult to "ascertain the damages caused by some remote action." *Ante*, at 458.

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[2] Sutherland's treatise on damages, on which the Court relied in *Holmes*, labels the same type of claims indirect: those where one party is injured, and it is that very injury—and not the wrongful behavior by the tortfeasor—that causes the injury to the plaintiff. See 1 J. Sutherland, Law of Damages 55 (1882) (hereinafter Sutherland). Indeed, every example cited in Sutherland in illustration of this principle parallels *Holmes;* the plaintiff would not be injured absent the injury to another victim. See Sutherland 55–56.

The Court's reliance on the difficulty of ascertaining the amount of Ideal's damages caused by petitioners' unlawful acts to label those damages indirect is misguided. *Holmes* and *Associated General Contractors* simply held that one reason that *indirect* injuries should not be compensable is that such injuries are difficult to ascertain. *Holmes, supra*, at 269; *Associated Gen. Contractors, supra*, at 542. We did not adopt the converse proposition that any injuries that are difficult to ascertain must be classified as indirect for purposes of determining proximate causation.[3]

Proximate cause and certainty of damages, while both related to the plaintiff's responsibility to prove that the amount of damages he seeks is fairly attributable to the defendant, are distinct requirements for recovery in tort.[4] See 4 Restatement (Second) of Torts § 912 (1977) (certainty of damages); 2 *id.*, §§ 430–431 (1963–1964) (proximate causation). That is, to recover, a plaintiff must show *both* that his injury is sufficiently connected to the tort that "the moral judgment and practical sense of mankind [will] recognize responsibility in the domain of morals," Sutherland 18, and that the specific pecuniary advantages, the loss of which is alleged as damages, "would have resulted, and, therefore, that the act complained of prevented them," *id.*, at 106–107. *Holmes* and *Associated General Contractors* dealt primarily with the former showing. The Court's discussion of the union's "highly speculative" damages in *Associated General Contractors* focused not on the difficulty of proving the precise amount of damages, but with "the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury." 459 U. S., at 545. Here, the relationship between the alleged RICO violation and the alleged injury is clear: Petitioners underpaid sales tax, permitting them to undercharge sales tax, inflicting competitive injury on respondent. The question with which the Court expresses concern—whether Ideal can prove the amount of its actual damages "with sufficient certainty," Sutherland 106, 107, to permit recovery—is simply not before the Court.

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[3] Indeed, in *Associated General Contractors*, we did not even squarely hold that the reason that indirect damages are not compensable was that the damages were not easily ascertainable; instead, we merely recognized the empirical fact that "[p]artly because it is indirect, and partly because the alleged effects on the Union may have been produced by independent factors, the Union's damages claim is also highly speculative." 459 U. S., at 542.

[4] Sutherland described the interrelation between the two concepts: "A fatal uncertainty may infect a case where an injury is easily provable, but the alleged responsible cause cannot be sufficiently established as to the whole or some part of that injury. So it may exist where a known

It is nonetheless worth noting that the Court overstates the difficulties of proof faced by respondent in this case. Certainly the plaintiff in this case, as in all tort cases involving damage to business, must demonstrate that he suffered a harm caused by the tort, and not merely by external market conditions. See generally Prosser & Keeton § 130, at 1014–1015, and nn. 92–99 (gathering cases authorizing liability for torts that "depriv[e] the plaintiff of customers or other prospects"); cf. *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S.

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and provable wrong or violation of contract appears, but the alleged loss or injury as a result of it cannot be certainly shown." Sutherland 94.

336, 342 (2005) ("[A]n inflated purchase price will not itself constitute or proximately cause the relevant economic loss," absent evidence that it was the inflated price that actually caused harm). But under the facts as alleged by Ideal, National did not generally lower its prices, so the Court need not inquire into "any number of reasons," *ante*, at 458, that it might have done so.[5] Instead, it simply *ceased charging tax* on cash sales, allegedly, and logically, because it had ceased reporting those sales and accordingly was not itself paying sales tax on them. App. 11–13. Nor is it fatal to Ideal's proof of damages that National could have continued to charge taxes to its customers and invested the additional money elsewhere. *Ante*, at 459. Had National actually done so, it might be difficult to ascertain the damages suffered by Ideal as a result of that investment. But the mere fact that National *could have* committed tax fraud without readily ascertainable injury to Ideal does not mean that its tax fraud *necessarily* caused no readily ascertainable injury in this case. Likewise, the Court is undoubtedly correct that "Ideal's lost sales could have resulted from factors other than petitioners' alleged acts of fraud." *Ibid.* However, the means through which the fraudulent scheme was carried out—with sales tax charged on noncash sales, but no tax charged on cash sales—renders the damages more ascertainable than in the typical case of lost business. In any event, it is well within the expertise of a district court to evaluate testimony and evidence and determine what portion of

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[5] Nor is it fair to require a plaintiff to prove that the tort caused the lowering of prices at the motion to dismiss stage. Ideal's complaint alleges that petitioners "pass on to National's customers the sales tax 'savings' that National realizes as a result of its false returns." App. 16. This allegation that, as a factual matter, National was able to charge a lower price after tax because of its fraud suffices to permit Ideal to survive a motion to dismiss on the question whether the prices were lowered due to the fraud, as opposed to other factors.

Ideal's lost sales are attributable to National's lower prices and what portion to other factors.

The Court also relies on an additional reason *Holmes* gave for limiting recovery to direct victims—namely, that "[t]he requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims." *Ante*, at 460 (citing *Holmes*, 503 U. S., at 269–270). Certainly, New York can sue here and vindicate the law, rendering respondent's enforcement of the law less necessary than it would be if respondent were the only direct victim of the illegal activity. But our recognition in *Holmes* that limiting recovery to direct victims would not undermine deterrence does not support the conclusion that any victim whose lawsuit is unnecessary for deterrence is an indirect victim. Indeed, in any tort case with multiple possible plaintiffs, a single plaintiff's lawsuit could suffice to vindicate the law. If multiple plaintiffs are direct victims of a tort, it would be unjust to declare some of their lawsuits unnecessary for deterrence, absent any basis for doing so in the relevant statute. Because respondent's injuries result from petitioners' fraud, and not from New York's injuries, respondent has a right to recover equal to that of New York.

Application of common-law principles of proximate causation beyond the directness requirement likewise supports a finding that causation was sufficiently pleaded in this case. Though the *Holmes* Court noted that directness was "one of [the] central elements" it had considered in evaluating causation, it recognized that proximate causation took "many shapes" at common law. *Id.*, at 268, 269. Cf. Prosser & Keeton § 42, at 273 (noting "two contrasting theories of legal cause," one extending liability to, but not beyond, "the scope of the 'foreseeable risks,'" and the other extending liability to, but not beyond, all "'directly traceable'" consequences and those indirect consequences that are foreseeable).[6] The proximate-cause limitation serves to ensure that "a defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct." Sutherland 57. "If one's fault happens to concur with something extraordinary, and therefore not likely to be foreseen, he will not be answerable for such unexpected result." *Ibid.* Based on this principle, courts have historically found proximate causation for injuries from natural causes, if a wrongful act "rendered it probable that such an injury will occur," *id.*, at 62; for injuries where the plaintiff's reliance is the immediate cause, such as in an action for fraud, so long as the reliance was "reasonably induced by the prior misconduct of the defendant," *id.*, at 62, 63; and for injuries where an innocent third party intervenes between the tortfeasor and the victim, such that the innocent third party is the *immediate* cause of the injury, so long as the tortfeasor "contributed so effectually to [the injury] as to be regarded as the efficient or at least concurrent and responsible cause," *id.*, at 64, 65 (emphasis deleted).

The Court of Appeals, by limiting RICO plaintiffs to those who are "'the targets, competitors and intended victims of the racketeering enterprise,'" 373 F. 3d 251, 260 (CA2 2004) (quoting *Lerner* v. *Fleet Bank, N. A.*, 318 F. 3d 113, 124 (CA2 2003)), outlined a proximate-causation standard that falls well in line both with the reasoning behind having a proximate-cause requirement at all, and with the traditional applications of this standard to tortfeasors who caused injury only through a two-step process. The Court, in contrast, permits a defendant to evade liability for harms that are not only foreseeable, but the *intended* consequences of the defendant's unlawful behavior. A defendant may do so simply by concocting a scheme under which a further, lawful and intentional step *by the defendant* is required to inflict the injury. Such a rule precludes recovery for injuries for which the defendant is plainly morally responsible and which are suffered by easily identifiable plaintiffs. There is no basis in the RICO statute, in common-law tort, or in *Holmes* for reaching this result.

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[6] Prosser and Keeton appear to use "direct" in a broader sense than that adopted by the Court in *Holmes*. See Prosser & Keeton §43, at 273, 293–297.

## II

Because neither the plain language of the civil RICO provision nor our precedent supports the Court's holding, it must be rejected. It is worth noting, however, that while the Court's holding in the present case may prevent litigation in an area far removed from the concerns about organized crime that led to RICO's enactment, that holding also precludes civil recovery for losses sustained by business competitors as a result of quintessential organized criminal activity, cases Congress indisputably intended its broad language to reach.

Congress plainly enacted RICO to address the problem of organized crime, and not to remedy general state-law criminal violations. See *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U. S. 229, 245 (1989). There is some evidence, to be sure, that the drafters knew that RICO would have the potential to sweep more broadly than organized crime and did not find that problematic. *Id.*, at 246–248. Nevertheless, the Court has recognized that "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors." *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 500 (1985).

Judicial sentiment that civil RICO's evolution is undesirable is widespread.[7] Numerous Justices have expressed dissatisfaction with either the breadth of RICO's application, *id.*, at 501 (Marshall, J., joined by Brennan, Blackmun, and Powell, JJ., dissenting) ("The Court's interpretation of the civil RICO statute quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law of frauds, and it approves the displacement of well-established federal remedial provisions. . . . [T]here is no indication that Congress even considered, much less approved, the scheme that the Court today defines"), or its general vagueness at outlining the conduct it is intended to prohibit, *H. J. Inc.*, *supra*, at 255–256 (SCALIA, J., joined by Rehnquist, C. J., and O'Connor and KENNEDY, JJ., concurring in judgment) ("No constitutional challenge to this law has been raised in the present case . . . . That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented"). Indeed, proposals for curtailing civil RICO have been introduced in Congress; for example, the Private Securities Litigation Reform Act, enacted in 1995, removed securities fraud as a predicate act under RICO. Pub. L. 104–67, § 107, 109 Stat. 758, amending 18 U. S. C. § 1964(c); see also Abrams, Crime Legislation and the Public Interest: Lessons from Civil RICO, 50 SMU L. Rev. 33, 34 (1996).

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[7] See Rehnquist, Remarks of the Chief Justice, 21 St. Mary's L. J. 5, 13 (1989) ("I think that the time has arrived for Congress to enact amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court"); Sentelle, Civil RICO: The Judges' Perspective, and Some Notes on Practice for North Carolina Lawyers, 12 Campbell L. Rev. 145, 148

This case, like the majority of civil RICO cases, has no apparent connection to organized crime. See *Sedima*, 473 U. S., at 499, n. 16 (quoting an ABA Task Force determination that, over the period reviewed, only 9% of civil RICO cases at the trial court level involved "'allegations of criminal activity of a type generally associated with professional criminals'"). Given the distance the facts of this case lie

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(1990) ("[E]very single district judge with whom I have discussed the subject (and I'm talking in the dozens of district judges from across the country) echoes the entreaty expressed in the Chief Justice's title in *The Wall Street Journal*[, Get RICO Cases Out of My Courtroom, May 19, 1989, p. A14, col. 4]").

from the prototypical organized criminal activity that led to RICO's enactment, it is tempting to find in the Act a limitation that will keep at least this and similar cases out of court.

The Court's attempt to exclude this case from the reach of civil RICO, however, succeeds in eliminating not only cases that lie far outside the harm RICO was intended to correct, but also those that were at the core of Congress' concern in enacting the statute. The Court unanimously recognized in *Sedima* that one reason—and, for the dissent, the principal reason—Congress enacted RICO was to protect businesses against competitive injury from organized crime. See *id.*, at 500–523 (Marshall, J., dissenting) (concluding that the provision conferring a right of action on individual plaintiffs had as its "principal target . . . the economic power of racketeers, and its toll on legitimate businessmen"); *id.*, at 494–500.

The unanimous view of the *Sedima* Court is correct. The sponsor of a Senate precursor to RICO noted that " '*the* evil to be curbed is the unfair competitive advantage inherent in the large amount of illicit income available to organized crime.' " *Id.*, at 514 (Marshall, J., dissenting) (quoting 113 Cong. Rec. 17999 (1967) (remarks of Sen. Hruska); some emphasis deleted); see also 473 U. S., at 515 (Marshall, J., dissenting) (" 'When organized crime moves into a business, it brings all the techniques of violence and intimidation which it used in its illegal businesses. Competitors are eliminated and customers confined to sponsored suppliers' "). Upon adding a provision for a civil remedy in a subsequently proposed bill, Senator Hruska noted:

> " '[This] bill also creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman. Despite the willingness of the courts to apply the Sherman Anti-Trust Act to organized crime activities, as a practical matter the legitimate businessman does not have adequate civil remedies available under that act. This bill fills that

> gap.'" *Id.*, at 516 (Marshall, J., dissenting) (quoting 115 Cong. Rec. 6993 (1969); emphasis deleted).

A portion of these bills was ultimately included in RICO, which was attached as Title IX to the Organized Crime Control Act. The Committee Report noted that the Title "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. Rep. No. 91–617, p. 76 (1969).

The observations of the President's Commission on Law Enforcement and Administration of Justice, the source of much of the congressional concern over organized crime, are consistent with these statements. Its chapter on organized crime noted that "organized crime is also extensively and deeply involved in legitimate business . . . . [I]t employs illegitimate methods—monopolization, terrorism, extortion, tax evasion—to drive out or control lawful ownership and leadership and to exact illegal profits from the public." The Challenge of Crime in a Free Society 187 (1967). The report noted that "[t]he millions of dollars [organized crime] can throw into the legitimate economic system gives it power to manipulate the price of shares on the stock market, to raise or lower the price of retail merchandise, to determine whether entire industries are union or nonunion, to make it easier or harder for businessmen to continue in business." *Ibid.*

It is not difficult to imagine a competitive injury to a business that would result from the kind of organized crime that *Sedima*, Congress, and the Commission all recognized as the principal concern of RICO, yet that would fail the Court's restrictive proximate-cause test. For example, an organized crime group, running a legitimate business, could, through threats of violence, persuade its supplier to sell goods to it at cost, so that it could resell those goods at a lower price to drive its competitor out of the business. Honest businessmen would be unable to compete, as they do not engage in threats of violence to lower their costs. Civil RICO, if it was intended to do anything at all, was intended to give those businessmen a cause of action. Cf. *Sedima*, 473 U. S., at 521–522 (Marshall, J., dissenting). Yet just like respondent, those businessmen would not themselves be the immediate target of the threats; the target would be the supplier. Like respondent's injury, their injury would be most immediately caused by the lawful activity of price competition, not the unlawful activity of threatening the supplier. Accordingly, under the Court's view, the honest businessman competitor would be just an "indirect" victim, whose injury was not proximately caused by the RICO violation.[8] Civil RICO would thus confer no right to sue on the individual who did not himself suffer the threats of violence, even if the threats caused him harm.

As a result, after today, civil RICO plaintiffs that suffer precisely the kind of injury that motivated the adoption of the civil RICO provision will be unable to obtain relief. If this result was compelled by the text of the statute, the interference with congressional intent would be unavoidable. Given that the language is not even fairly susceptible of such a reading, however, I cannot agree with this frustration of congressional intent.

## III

Because I conclude that Ideal has sufficiently pleaded proximate cause, I must proceed to the question which the Court does not reach: whether reliance is a required element of a RICO claim predicated on mail or wire fraud and, if it is, whether that reliance must be by the plaintiff. The Court of Appeals held that reliance is required, but that "a RICO claim based on mail fraud may be proven where the misrepresentations were relied on by a third person, rather than by the plaintiff." 373 F. 3d, at 262, 263. I disagree with the conclusion that reliance is required at all. In my view, the mere fact that the predicate acts underlying a particular RICO violation happen to be fraud offenses does not mean that reliance, an element of common-law fraud, is also incorporated as an element of a civil RICO claim.

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[8] The honest businessman would likewise fail JUSTICE SCALIA's theory of proximate causation, because laws against threats of violence are intended to protect those who are so threatened, not other parties that might suffer as a consequence. *Ante*, at 462 (concurring opinion).

Petitioners are correct that the common law generally required a showing of justifiable reliance before a plaintiff could recover for damages caused by fraud. See *Neder* v. *United States*, 527 U. S. 1, 24–25 (1999); Prosser & Keeton § 105, at 728. But RICO does not confer on private plaintiffs a right to sue defendants who engage in any act of common-law fraud; instead, racketeering activity includes, as relevant to this case, "any act which is indictable under [18 U. S. C. §] 1341 (relating to mail fraud) [and §] 1343 (relating to wire fraud)." § 1961(1) (2000 ed., Supp. III). And we have recognized that these criminal fraud statutes "did not incorporate *all* the elements of common-law fraud." *Neder*, 527 U. S., at 24. Instead, the criminal mail fraud statute applies to anyone who, "having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office . . . any matter or thing whatever to be sent or delivered by the Postal Service . . . ." § 1341. See § 1343 (similar language for wire fraud). We have specifically noted that "[b]y prohibiting the 'scheme to defraud,' rather than the completed fraud, the elements of reliance . . . would clearly be inconsistent with the statutes Congress enacted." *Id.*, at 25.

Because an individual can commit an indictable act of mail or wire fraud even if no one relies on his fraud, he can engage in a pattern of racketeering activity, in violation of § 1962, without proof of reliance. Accordingly, it cannot be disputed that the Government could prosecute a person for such behavior. The terms of § 1964(c) (2000 ed.), which broadly authorize suit by "[a]ny person injured in his business or property by reason of a violation of section 1962," permit no different conclusion when an individual brings a civil action against such a RICO violator.

It is true that our decision in *Holmes* to apply the common-law proximate-cause requirement was likewise not compelled by the broad language of the statute. But our decision in that case was justified by the "very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover." 503 U. S., at 266. This unlikelihood stems, in part, from the nature of proximate cause, which is "not only a general condition of civil liability at common law but is almost essential to shape and delimit a rational remedy." *Systems Management, Inc.* v. *Loiselle,* 303 F. 3d 100, 104 (CA1 2002). We also decided *Holmes* in light of Congress' decision to use the same words to impose civil liability under RICO as it had in § 7 of the Sherman Act, 26 Stat. 210, into which federal courts had implied a proximate-cause limitation. 503 U. S., at 268. Accordingly, it was fair to interpret the broad language "by reason of" as meaning, in all civil RICO cases, that the violation must be both the cause-in-fact and the proximate cause of the plaintiff's injury.

Here, by contrast, the civil action provision cannot be read to always require that the plaintiff have relied on the defendant's action. Reliance is not a general limitation on civil recovery in tort; it "is a specialized condition that happens to have grown up with common law fraud." *Loiselle, supra,* at 104. For most of the predicate acts underlying RICO violations, it cannot be argued that the common law, if it even recognized such acts as civilly actionable, required proof of reliance. See § 1961 (2000 ed., Supp. III). In other words, there is no language in § 1964(c) (2000 ed.) that could fairly be read to add a reliance requirement in fraud cases only. Nor is there any reason to believe that Congress would have defined "racketeering activity" to include acts indictable under the mail and wire fraud statutes, if it intended fraud-related acts to be predicate acts under RICO only when those acts would have been actionable under the common law.

Because reliance cannot be read into §§ 1341 and 1343, nor into RICO itself, it is not an element of a civil RICO claim. This is not to say that, in the general case, a plaintiff will not have to prove that someone relied on the predicate act of fraud as part of his case. If, for example, New York had not believed petitioners' misrepresentation with respect to their sales, Ideal may well not have been injured by petitioners' scheme, which would have faltered at the first step. Indeed, petitioners recognize that "in the ordinary misrepresentation case, the reliance requirement simply functions as a necessary prerequisite to establishing the causation required by the language of § 1964(c)." Brief for Petitioners 29. But the fact that proof of reliance is often used to prove an element of the plaintiff's cause of action, such as the element of causation, does not transform reliance itself into an element of the cause of action. See *Loiselle, supra,* at 104 ("Reliance is doubtless the most obvious way in which fraud can cause harm, but it is not the only way"). Because respondent need not allege reliance at all, its complaint, which alleges that New York relied on petitioners' misrepresentations, App. 16, is more than sufficient.

* * *

The Congress that enacted RICO may never have intended to reach cases like the one before us, and may have "federalize[d] a great deal of state common law" without any intention of "produc[ing] these far-reaching results." *Sedima,* 473 U. S., at 506 (Marshall, J., dissenting). But this Court has always refused to ignore the language of the statute to limit it to "the archetypal, intimidating mobster," and has instead recognized that "[i]t is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications." *Id.,* at 499–500.

Today, however, the Court not only eliminates private RICO actions in some situations Congress may have inadvertently regulated, but it substantially limits the ability of civil RICO to reach even those cases that motivated Congress' enactment of this provision in the first place. I respectfully dissent.

JUSTICE BREYER, concurring in part and dissenting in part.

In my view, the civil damages remedy in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§ 1961–1968 (2000 ed. and Supp. III), does not cover claims of injury by one competitor where the legitimate procompetitive activity of another competitor immediately causes that injury. I believe that this is such a case and would consequently hold that RICO does not authorize the private action here at issue.

## I

### A

RICO essentially seeks to prevent organized criminals from taking over or operating legitimate businesses. Its language, however, extends its scope well beyond those central purposes. RICO begins by listing certain predicate acts, called " 'racketeering activity,' " which consist of other crimes, ranging from criminal copyright activities, the facilitation of gambling, and mail fraud to arson, kidnaping, and murder. § 1961(1) (2000 ed., Supp. III). It then defines a " 'pattern of racketeering activity' " to include engaging in "at least two" predicate acts in a 10-year period. § 1961(5) (2000 ed.). And it forbids certain business-related activities involving such a "pattern" and an "enterprise." The forbidden activities include using funds derived from a "pattern of racketeering activity" in acquiring, establishing, or operating any enterprise, and conducting the affairs of any enterprise through such "a pattern." §§ 1962(a), (c).

RICO, a federal criminal statute, foresees criminal law enforcement by the Federal Government. § 1963 (2000 ed., Supp. III). It also sets forth civil remedies. § 1964 (2000 ed.). District courts "have jurisdiction to prevent and restrain [RICO] violations." § 1964(a). And a person "injured in his business or property by reason of a [RICO] violation" may seek treble damages and attorney's fees. § 1964(c).

### B

The present case is a private RICO treble-damages action. A steel supply company, Ideal Steel, has sued a competing steel supply company, National Steel, and its owners, Joseph and Vincent Anza (to whom I shall refer collectively as "National"). Ideal says that National committed mail fraud by regularly filing false New York state sales tax returns in order to avoid paying sales tax that it owed—activity that amounts to a "pattern of racketeering activity." This activity enabled National to charge lower prices without reducing its profit margins. Ideal says National used some of these excess profits to fund the building of a new store. Both the lower prices and the new outlet attracted Ideal customers, thereby injuring Ideal. Hence, says Ideal, it was injured "in [its] business . . . by reason of" violations of two RICO provisions, the provision that forbids conducting an "enterprise's affairs" through a "pattern of racketeering activity" and the provision that forbids investing funds derived from such a "pattern" in an "enterprise." §§ 1962(c), (a), 1964(c). The question before us is whether RICO permits Ideal to bring this private treble-damages claim.

## II

This Court, in *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268 (1992), held that RICO's private treble-damages provision "demand[ed] . . . some direct relation between the injury asserted and the injurious conduct alleged." The Court then determined that the injury alleged by the plaintiff in that case was too remote from the injurious conduct to satisfy this requirement.

I do not agree with the majority insofar as it believes that *Holmes'* holding in respect to the fact pattern there at issue virtually dictates the answer to the question here. In my view, the "causal connection" between the forbidden conduct and plaintiff's harm is, in certain key ways, more direct here than it was in *Holmes.* In *Holmes,* the RICO plaintiff was a surrogate for creditors of broker-dealers that went bankrupt after losing money in stocks that had been overvalued due to fraudulent statements made by the RICO defendant and others. Put in terms of "proximate cause," the plaintiff's harm (an ordinary creditor loss) differed in kind from the harm that the "predicate acts" (securities fraud) would ordinarily cause (stock-related monetary losses). The harm was "indirect" in the sense that it was entirely derivative of the more direct harm the defendant's actions had caused the broker-dealers; and, there were several steps between the violation and the harm (misrepresentation—broker-dealer losses—broker-dealer business failure—ordinary creditor loss). Here, however, the plaintiff alleges a harm (lost customers) that flows directly from the lower prices and the opening of a new outlet—actions that were themselves allegedly caused by activity that Congress designed RICO to forbid (conducting a business through a "pattern" of "predicate acts" and investing in business funds derived from such a "pattern"). In this sense, the causal links before us are more "direct" than those in *Holmes.* See *ante,* at 464–465 (THOMAS, J., concurring in part and dissenting in part).

Nonetheless, I agree with the majority that *Holmes* points the way. That case makes clear that RICO contains important limitations on the scope of private rights of action. It specifies that RICO does not provide a private right of action "simply on showing that the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of [the] plaintiff's injury." 503 U. S., at 265–266 (footnote omitted). Pointing out "the very unlikelihood that Congress meant to allow *all* factually injured plaintiffs to recover," *id.*, at 266 (emphasis added), *Holmes* concludes that RICO imposes a requirement of "proximate cause," a phrase that "label[s] generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts," *id.*, at 268. It recognizes that these tools seek to discern "'what justice demands, or . . . what is administratively possible and convenient.'" *Ibid.* (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts §41, p. 264 (5th ed. 1984)). It also explains that "proximate cause" demands "directness," while specifying that "directness" is only one of "the many shapes this concept took at common law." 503 U. S., at 268, 269. And it points to antitrust law, both as a source of RICO's treble-damages provisions and as an aid to their interpretation. *Ibid.*

In my view, the "antitrust" nature of the treble-damages provision's source, taken together with both RICO's basic objectives and important administrative concerns, implies that a cause is "indirect," *i. e.*, it is not a "proximate cause," if the causal chain from forbidden act to the injury caused a competitor proceeds through a legitimate business' ordinary competitive activity. To use a physical metaphor, ordinary competitive actions undertaken by the defendant competitor cut the *direct* causal link between the plaintiff competitor's injuries and the forbidden acts.

The basic objective of antitrust law is to encourage the competitive process. In particular, that law encourages businesses to compete by offering lower prices, better products, better methods of production, and better systems of distribution. See, *e. g.*, 1 P. Areeda & H. Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶100a, pp. 3–4 (2d ed. 2000). As I shall explain, these principles suggest that RICO does not permit private action based solely upon this competitive type of harm, *i. e.*, harm a plaintiff suffers only because the defendant was able to attract customers through normal competitive methods, such as lower prices, better products, better methods of production, or better systems of distribution. In such cases, the harm falls outside the limits that RICO's private treble-damages provision's "proximate-cause" requirement imposes. In such cases the distance between the harm and the predicate acts that funded (or otherwise enabled) such ordinary competitive activity is too distant. The harm is not "direct."

At the same time, those principles suggest that other types of competitive injuries not within their protective ambit could lie within, not outside, "proximate-cause" limits. Where, for example, a RICO defendant attracts customers in ways that involve illegitimate competitive means, *e. g.*, by threatening violence, a claim may still lie. Claims involving RICO violations that objectively target a particular competitor, *e. g.*, bribing an official to harass a competitor, could also be actionable.

Several considerations lead to this conclusion. First, I have found no case (outside the Second Circuit, from which this case arose) in which a court has authorized a private treble-damages suit based upon no more than a legitimate business' ordinary procompetitive activity (even where financed by the proceeds of a RICO predicate act).

Second, an effort to bring harm caused by ordinary competitive activity within the scope of RICO's private treble-damages action provision will raise serious problems of administrability. *Ante*, at 458–460 (majority opinion); see also *Holmes*, *supra*, at 269. To demonstrate that a defendant's lower price caused a plaintiff to lose customers (or profits) requires the plaintiff to show what would have happened in its absence. Would customers have changed suppliers irrespective of the price change because of other differences in the suppliers? Would other competing firms have lowered their prices? Would higher prices have attracted new entry? Would demand for the industry's product, or the geographic scope of the relevant market, have changed? If so, how? To answer such questions based upon actual market circumstances and to apportion damages among the various competitors harmed is difficult even for plaintiffs trying to trace harm caused by a defendants' *anti*-competitive behavior. *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 542, 544 (1983) (the possibility that harm "may have been produced by independent factors" and "the danger of complex apportionment of damages" weigh against finding the requisite causal connection in an antitrust case). To answer such questions in the context of better functioning markets, where prices typically reflect competitive conditions, would likely prove yet more difficult.

Third, where other victims, say, victims of the underlying RICO "predicate acts" are present, there is no pressing need to provide such an action. Those alternative victims (here the State of New York) typically "could be counted on to bring suit for the law's vindication." *Holmes*, *supra*, at 273. They could thus fulfill Congress' aim in adopting the civil remedy of "turn[ing victims] into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." *Rotella* v. *Wood*, 528 U. S. 549, 557 (2000) (citing *Klehr* v. *A. O. Smith Corp.*, 521 U. S. 179, 187 (1997)).

Fourth, this approach to proximate cause would retain private actions aimed at the heart of Congress' relevant RICO concerns. RICO's sponsors, in reporting their underlying reasons for supporting RICO, emphasized, not the fair, ordinary competition that an infiltrated business might offer its competitors, but the risk that such a business would act corruptly, exercising *unfair* methods of competition. S. Rep. No. 91–617, pp. 76–78 (1969); see also *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U. S. 158, 165 (2001). RICO focuses upon the "infiltration of legitimate business by organized crime," in significant part because, when "'organized crime moves into a business, it brings all the techniques of violence and intimidation which it used in its illegal businesses.'" *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 517, 515 (1985) (Marshall, J., dissenting) (quoting 113 Cong. Rec. 17999 (1967)).

My approach would not rule out private actions in such cases. Nor would it rule out three of the four suits mentioned by Justice Marshall, dissenting in *Sedima*, when he describes RICO's objectives. It would not rule out lawsuits by injured competitors or legitimate investors if a racketeer, "uses '[t]hreats, arson and assault . . . to force competitors out of business'"; "uses arson and threats to induce honest businessmen to pay protection money, or to purchase certain goods, or to hire certain workers"; or "displace[s]" an "honest investor" when he "infiltrates and obtains control of a legitimate business . . . through fraud" or the like. 473 U. S., at 521, 522.

I concede that the approach would rule out a competitor's lawsuit based on no more than an "infiltrated enterprise" operating a legitimate business to a businessman's competitive disadvantage because unlawful predicate acts helped that legitimate business build a "strong economic base." And I recognize that this latter kind of suit at least arguably would have provided helpful deterrence had the view of *Sedima's dissenting Justices* prevailed. *Id.*, at 500–523 (Marshall, J., dissenting) (arguing that RICO's private action provision did not authorize suits based on harm flowing directly from predicate acts); *id.*, at 523–530 (Powell, J., dissenting) (same). But the dissent did not prevail, and the need for deterrence consequently offers only weakened support for a reading of RICO that authorizes private suits in this category.

Fifth, without this limitation, RICO enforcement and basic antitrust policy could well collide. Firms losing the competitive battle might find bases for a RICO attack on their more successful competitors in claimed misrepresentations or even comparatively minor misdeeds by that competitor. Firms that fear such treble-damages suits might hesitate to compete vigorously, particularly in concentrated industries where harm to a competitor is more easily traced but where the consumer's need for vigorous competition is particularly strong. The ultimate victim of any such tendency to pull ordinary competitive punches of course would be not the competing business, but the consumer. Although Congress did not intend its RICO treble-damages provision as a simple copy of the antitrust laws' similar remedies, see, *e. g., Sedima, supra,* at 498–499, there is no sound reason to interpret RICO's treble-damages provision as if Congress intended to set it and its antitrust counterpart at cross-purposes.

For these reasons, I would read into the private treble-damages provision a "proximate-cause" limitation that places outside the provision harms that are traceable to an unlawful act only through a form of legitimate competitive activity.

## III

Applying this approach to the present case, I would hold that neither of Ideal's counts states a RICO private treble-damages claim. National is a legitimate business. Another private plaintiff (the State of New York) is available. The question is whether Ideal asserts a harm caused directly by something other than ordinary competitive activity, *i. e.,* lower prices, a better product, a better distribution system, or a better production method.

Ideal's second count claims injury caused by National's (1) having taken customers (2) attracted by its new store (3) that it financed in part through profits generated by the tax fraud scheme, and the financing is the relevant violation. § 1962(a). The opening of a distribution outlet is a legitimate competitive activity. It benefits the firm that opens it by making it more convenient for customers to purchase from that supplier. That ordinary competitive process is all the complaint describes. And for the reasons I have given in Part II, *supra,* I believe that the financing of a new store—even with funds generated by unlawful activities—is not sufficient to create a private cause of action as long as the activity funded amounts to legitimate competitive activity. Ideal must look for other remedies, *e. g.*, bringing the facts to the attention of the United States Attorney or the State of New York.

Ideal's first count presents a more difficult question. It alleges that National filed false sales tax returns to the State of New York. As an action indictable under the federal mail fraud statute, that action is a predicate act under RICO. See § 1961(1) (2000 ed., Supp. III). National passed these savings on to its cash customers by not charging them sales tax, thereby attracting more cash customers than it would have without the scheme. Is this a form of injury caused, not by ordinary competitive activity, but simply by the predicate act itself?

In my view, the answer to this question is "no." The complaint alleges predicate acts that amount simply to the facts that National did not "charge" or "pay" sales taxes or accurately "report" sales figures to the State. National did not tell its customers, "We shall not pay sales taxes." Rather, it simply charged the customer a lower price, say, $100 rather than $100 plus $8 tax. Consider a retailer who advertises to the customer a $100 table and adds, "We pay all sales taxes." Such a retailer is telling the customer that he will charge the customer a lower price by the amount of the tax, *i. e.,* about $92. The retailer implies that he, the retailer, will pay the tax to the State, taking the requisite amount owed to the State from the $100 the customer paid for the item.

The defendants here have done no more. They have in effect cut the price of the item by the amount of the sales tax and then kept the money instead of passing it on to the State. They funded the price cut from the savings, but the source of the savings is, in my view, beside the point as long as the price cut itself is legitimate. I can find nothing in the complaint that suggests it is not.

For these reasons, I would reverse the decision of the Court of Appeals on both counts.

# ZEDNER *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 05–5992. Argued April 18, 2006—Decided June 5, 2006

The Speedy Trial Act of 1974 (Act) generally requires a federal criminal trial to begin within 70 days after a defendant is charged or makes an initial appearance. 18 U. S. C. § 3161(c)(1). Recognizing that criminal cases vary widely and that there are valid reasons for greater delay in particular cases, the Act includes a long and detailed list of periods of delay that are excluded in computing the time within which trial must start. Section 3161(h)(8) permits a district court to grant a continuance and exclude the resulting delay if it makes on-the-record findings that the ends of justice served by granting the continuance outweigh the public's and defendant's interests in a speedy trial. To promote compliance without needlessly subverting important criminal prosecutions, the Act provides that, if the trial does not begin on time and the defendant moves, before the trial's start or entry of a guilty plea, to dismiss, the district court must dismiss the charges, though it may choose whether to do so with or without prejudice.

In April 1996, petitioner was indicted on charges arising from his attempt to open accounts using counterfeit United States bonds. The District Court granted two "ends-of-justice" continuances, see § 3161(h)(8). When, at a November 8 status conference, petitioner requested another delay to January 1997, the court suggested that petitioner waive the application of the Act "for all time," and produced a preprinted waiver form for petitioner to sign. At a January 31, 1997, status conference, the court granted petitioner another continuance so that he could attempt to authenticate the bonds, but made no mention of the Act and no findings to support excluding the 91 days between January 31 and petitioner's next court appearance on May 2 (1997 continuance). Four years later, petitioner filed a motion to dismiss the indictment for failure to comply with the Act, which the District Court denied based on the waiver "for all time." In a 2003 trial, petitioner was convicted. The Second Circuit affirmed. Acknowledging that a defendant's waiver of rights under the Act may be ineffective because of the public interest served by compliance with the Act, the court found an exception for situations when the defendant causes or contributes to the delay. It also suggested that the District Court could have properly excluded the 91-day period based on the ends of justice, given the case's complexity and the defense's request for additional time to prepare.

*Held:*

1. Because a defendant may not prospectively waive the application of the Act, petitioner's waiver "for all time" was ineffective. Pp. 500–503.

(a) The Act comprehensively regulates the time within which a trial must begin. Section 3161(h), which details numerous categories of delay that are not counted in applying the Act's deadlines, conspicuously has no provision excluding periods of delay during which a defendant waives the Act's application. It is apparent from the Act's terms that this was a considered omission. Instead of allowing defendants to opt out, the Act demands that continuances fit within one of § 3161(h)'s specific exclusions. In deciding whether to grant an ends-of-justice continuance, a court must consider a defendant's need for "reasonable time to obtain counsel," "continuity of counsel," and "effective preparation" of counsel. § 3161(h)(8)(B)(iv). If a defendant could simply waive the Act's application in order to secure more time, no defendant would ever need to put such considerations before the court under the rubric of an ends-of-justice exclusion. The Act's purposes also cut against exclusion on the grounds of mere consent or waiver. Were the Act solely designed to protect a defendant's right to a speedy trial, such an application might make sense, but the Act was also designed with the public interest firmly in mind. This interpretation is entirely in accord with the Act's legislative history. Pp. 500–502.

(b) This Court rejects the District Court's reliance on § 3162(a)(2), which provides that a defendant whose trial does not begin on time is deemed to have waived the right to move for dismissal if that motion is not filed prior to trial or entry of a guilty plea. That section makes no mention of prospective waivers, and there is no reason to think that Congress wanted to treat prospective and retrospective waivers similarly. Allowing prospective waivers would seriously undermine the Act because, in many cases, the prosecution, defense, and court would all like to opt out, to the detriment of the public interest. Section 3162(a)(2)'s retrospective waiver does not pose a comparable danger. Because the prosecution and court cannot know until the trial starts or the guilty plea is entered whether the defendant will forgo moving to dismiss, they retain a strong incentive to make sure the trial begins on time. Pp. 502–503.

2. Petitioner is not estopped from challenging the excludability under the Act of the 1997 continuance. Factors that "typically inform the decision whether to apply the [estoppel] doctrine in a particular case" include (1) whether "a party's later position [is] clearly inconsistent with

its earlier position"; (2) "whether the party has succeeded in persuading a court to accept that . . . earlier position"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire* v. *Maine,* 532 U. S. 742, 750–751. None of the three possible "positions" taken by petitioner gives rise to an estoppel. First, recognizing an estoppel based on petitioner's promise not to move for dismissal under § 3162(a)(2) would entirely swallow the Act's no-waiver policy. Second, petitioner's (mistaken) agreement that waivers are enforceable does not provide a ground for estoppel because petitioner did not "succee[d] in persuading" the District Court to accept the validity of prospective waivers. On the contrary, the District Court requested the waiver and produced the form for petitioner to sign. Even if the other factors favor estoppel, they do not predominate. Finally, petitioner's representation at the January 31 status conference that a continuance was needed to gather evidence of the bonds' authenticity does not support estoppel because that position was not "clearly inconsistent" with the position that he now takes in seeking dismissal, *i. e.,* that delay from that continuance was not excluded under the Act. Nothing in the discussion at the conference suggests that the question presented by the continuance request was viewed as anything other than a case-management question laying entirely within the District Court's discretion. Pp. 503–506.

3. When a district court makes no findings on the record to support a § 3161(h)(8) continuance, harmless-error review is not appropriate. The Government argues that an express finding need not be entered contemporaneously and could be supplied on remand. But the Act requires express findings, see § 3161(h)(8)(A), and at the very least implies that those findings must be put on the record by the time the district court rules on the motion to dismiss. Because the District Court made no such express findings, the 1997 continuance is not excluded from the speedy trial clock. This error is not subject to harmless-error review. Harmless-error review under Federal Rule of Criminal Procedure 52(a) presumptively applies to "*all* errors where a proper objection is made," *Neder* v. *United States,* 527 U. S. 1, 7, but strong support for an implied repeal of Rule 52(a) in this context is provided by the Act's unequivocal provisions, which specify that a trial "*shall* commence" within 70 days, § 3161(c)(1) (emphasis added), and that "*[n]o . . . period of delay*" from an ends-of-justice continuance "*shall be excludable*" from the time period unless the court sets forth its reasoning, § 3161(h)(8)(A) (emphasis added). Applying harmless-error review would also tend to undermine the detailed requirements of the provisions regulating ends-of-justice continuances. Pp. 506–509.

4. Because the 91-day continuance, which was not excluded from the speedy trial clock, exceeded the maximum 70-day delay, the Act was violated, and there is no need to address whether other periods of delay were not excludable. The District Court may determine in the first instance whether the dismissal in this case should be with or without prejudice. P. 509.

401 F. 3d 36, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined, and in which SCALIA, J., joined as to all but Part III–A–2. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 509.

*Edward S. Zas*, by appointment of the Court, 546 U. S. 1167, argued the cause for petitioner. With him on the briefs were *Barry D. Leiwant* and *Sean Hecker*.

*Daryl Joseffer* argued the cause for the United States. With him on the brief were *Solicitor General Clement, Assistant Attorney General Fisher, Deputy Solicitor General Dreeben*, and *Thomas E. Booth*.

JUSTICE ALITO delivered the opinion of the Court.

This case requires us to consider the application of the doctrines of waiver, judicial estoppel, and harmless error to a violation of the Speedy Trial Act of 1974 (Speedy Trial Act or Act), 18 U. S. C. §§3161–3174. The Act generally requires a federal criminal trial to begin within 70 days after a defendant is charged or makes an initial appearance, §3161(c)(1), but the Act contains a detailed scheme under which certain specified periods of delay are not counted. In this case, petitioner's trial did not begin within 70 days of indictment. Indeed, his trial did not commence until more than seven years after the filing of the indictment, but petitioner, at the suggestion of the trial judge, signed a blanket, prospective waiver of his rights under the Act. We address the following questions: whether this waiver was effective; whether petitioner is judicially estopped from challenging the validity of the waiver; and whether the trial judge's failure to make the findings required to exclude a period of delay under a particular provision of the Act, § 3161(h)(8), was harmless error.

## I

In March 1996, petitioner attempted to open accounts at seven financial institutions using counterfeit $10 million United States bonds. The quality of the counterfeiting was, to put it mildly, not expert. One bond purported to be issued by the "Ministry of Finance of U. S. A." 401 F. 3d 36, 39 (CA2 2005) (internal quotation marks omitted). Others contained misspelled words such as "Thunted States" and the "Onited States" (United States), "Dhtladelphla" (Philadelphia), "Cgicago" (Chicago), and "forevev" (forever). *Id.*, at 39, n. 1 (internal quotation marks omitted). After petitioner presented these bonds, the Secret Service was contacted, and petitioner was arrested. Following arraignment on a criminal complaint, he was released on bond.

On April 4, 1996, a grand jury in the Eastern District of New York indicted petitioner on seven counts of attempting to defraud a financial institution, in violation of 18 U. S. C. § 1344, and one count of knowingly possessing counterfeit obligations of the United States, in violation of § 472. On June 26, the District Court, citing the complexity of the case, granted what is termed an "ends-of-justice" continuance, see § 3161(h)(8)(B)(ii), until September 6. On September 6, the District Court granted another continuance, this time until November 8.

At the November 8 status conference, petitioner requested, without opposition from the Government, a further adjournment to January 1997. Concerned about the difficulty of fitting petitioner's trial into its heavily scheduled calendar and the prospect that petitioner might "only waive [the Act] for so long as it is convenient for [him] to waive," the District Court instructed petitioner as follows: "I think if I'm going to give you that long an adjournment, I will have to take a waiver for all time." App. 71. Petitioner's counsel responded that the defense would "waive for all time. That will not be a problem. That will not be an issue in this case." *Id.*, at 72.

The District Court then addressed petitioner directly and appears to have attempted to explain the operation of a provision of the Act, 18 U. S. C. § 3162(a)(2), under which a defendant whose trial does not begin on time is deemed to have waived the right to move for dismissal of the information or indictment if he or she does not file that motion prior to trial or entry of a guilty plea. The District Court reasoned: "[I]f you can waive [the Act] by inaction, *i. e.*, not raising the motion to dismiss, you can waive affirmatively, knowledgeably, intelligently your right to do so, your right to a speedy trial and your right to make a motion to dismiss for the speedy trial." App. 73. The court told petitioner that it was "prepared to start . . . trial right away," *ibid.*, but that if a continuance was granted, petitioner might have to wait some time for trial because the court had a "fairly big cas[e] . . . which [wa]s set to take eight months for trial." "[I]f that [trial] starts before you start," the court warned, "you may have to wait until that is done." *Id.*, at 74.

The District Court then produced a preprinted form—apparently of its own devising—captioned "Waiver of Speedy Trial Rights." *Id.*, at 79. The court led petitioner and his counsel through the form, and both signed it. Among other things, the form stated: "I wish to waive my rights to a speedy trial . . . under the Speedy Trial Act of 1974 (18 U. S. C. § 3161 *et seq.*), under the Rules of this Circuit and under the Speedy Trial Plan adopted by this Court." *Ibid.* The form also stated: "I have been advised and fully understand that . . . I also waive any and all rights to make a motion to dismiss the indictment . . . against me for failure of the Court to give me a speedy trial and that I waive all of such rights to a speedy trial and to make such a motion or motions for all time." *Ibid.* After the form was signed, petitioner's counsel requested that a further status conference be scheduled for January 31, 1997, and the court agreed. *Id.*, at 77.

At the January 31 status conference, petitioner sought yet another continuance "to tap . . . the proper channels to authenticate [the] bonds." *Id.*, at 81. Petitioner and the Government emphasized that this request raised no issue under the Act because petitioner had "waived for all time," though the Government suggested that it "would like to try the case sometime in 1997." *Ibid.* After a brief discussion between the court and petitioner's counsel about the need to investigate the authenticity of what seemed such obviously fake bonds, the court offered to set trial for May 5, 1997. *Id.*, at 86. The court admonished petitioner's counsel to "[g]et to work" and noted: "This [case] is a year old. That's enough for a criminal case." *Id.*, at 86, 85. Nevertheless, apparently satisfied with petitioner's waiver "for all time," the District Court made no mention of the Act and did not make any findings to support exclusion of the 91 days between January 31 and petitioner's next court appearance on May 2, 1997 (1997 continuance).

The four years that followed saw a variety of proceedings in petitioner's case, but no trial. See 401 F. 3d, at 40–41. Counsel sought to be relieved because petitioner insisted that he argue that the bonds were genuine, and the court ultimately granted counsel's request to withdraw. At the court's suggestion, petitioner was examined by a psychiatrist, who determined that petitioner was competent to stand trial. Petitioner then asked to proceed *pro se* and sought to serve subpoenas on, among others, the President, the Chairman of the Federal Reserve Board, the Attorney General, the Secretary of State, the late Chinese leader Chiang Kai-shek, and "'The Treasury Department of Treasury International Corporation.'" *Id.*, at 40; App. 129. After a year of quashed subpoenas, the District Court set the case for trial, only to conclude on the morning of jury selection that it had to inquire once again into petitioner's competency. The court dismissed the jury panel, found petitioner incompetent, and committed him to the custody of the Attorney General for hospitalization and treatment. On interlocutory appeal, however, the Court of Appeals vacated that order and remanded for further hearings. In July and August 2000, the District Court held those hearings and received further briefing on the competency issue.

On March 7, 2001, while the competency issue remained under submission, petitioner moved to dismiss the indictment for failure to comply with the Act. The District Court denied the motion on the ground that petitioner had waived his Speedy Trial Act rights "for all time," mentioning in passing that the case was complex. *Id.*, at 128–129. In the same order, the court found petitioner incompetent. *Id.*, at 135. That latter determination was upheld on interlocutory appeal, and petitioner was committed for evaluation. After several months of hospitalization, petitioner was found to be delusional but competent to stand trial, and he was released.

Finally, on April 7, 2003, more than seven years after petitioner was indicted, his trial began. The jury found petitioner guilty on six counts of attempting to defraud a financial institution,[1] and the court sentenced him to 63 months of imprisonment.

The Court of Appeals affirmed the judgment of conviction.[2] Acknowledging that "a defendant's waiver of rights under the Speedy Trial Act may be ineffective" because of the public interest served by compliance with the Act, the Court of Appeals found an exception for situations "'when defendant's conduct causes or contributes to a period of delay.'" 401 F. 3d, at 43–44 (quoting *United States* v. *Gambino,* 59 F. 3d 353, 360 (CA2 1995)). "[D]oubt[ing] that the public interest in expeditious prosecution would be served by a rule that allows defendants to request a delay and then protest the grant of their request," the Court of Appeals held that petitioner would not be heard to complain of the 91-day delay in early 1997. 401 F. 3d, at 45. The Court of Appeals went on to suggest that there "can be no doubt that the district court could have properly excluded this period of time based on the ends of justice" in light of the complexity of the case and defense counsel's request for additional time to prepare. *Ibid.*

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[1] The Government dismissed the other counts before trial.

[2] The Court of Appeals ultimately remanded the case for resentencing in light of *United States* v. *Booker*, 543 U. S. 220 (2005). That issue is not before us, though we note that the District Court has indicated it would impose the same 63-month sentence if the defendant is produced for resentencing. No. 96–CR–285 (TCP) (EDNY, Oct. 27, 2005).

We granted certiorari to resolve the disagreement among the Courts of Appeals on the standard for analyzing whether a defendant has made an effective waiver of rights under the Act. 546 U. S. 1085 (2006).

## II

As noted above, the Speedy Trial Act generally requires a trial to begin within 70 days of the filing of an information or indictment or the defendant's initial appearance, 18 U. S. C. § 3161(c)(1), but the Act recognizes that criminal cases vary widely and that there are valid reasons for greater delay in particular cases. To provide the necessary flexibility, the Act includes a long and detailed list of periods of delay that are excluded in computing the time within which trial must start. See § 3161(h). For example, the Act excludes "delay resulting from other proceedings concerning the defendant," § 3161(h)(1), "delay resulting from the absence or unavailability of the defendant or an essential witness," § 3161(h)(3)(A), "delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial," § 3161(h)(4), and "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted," § 3161(h)(7).

Much of the Act's flexibility is furnished by § 3161(h)(8), which governs ends-of-justice continuances, and which we set out in relevant part in the margin.[3] This provision permits a district court to grant a continuance and to exclude the resulting delay if the court, after considering certain factors, makes on-the-record findings that the ends of justice served by granting the continuance outweigh the public's and defendant's interests in a speedy trial. This provision gives the district court discretion—within limits and subject to specific procedures—to accommodate limited delays for case-specific needs.

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[3] Title 18 U. S. C. § 3161(h)(8) provides:

"(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

"(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

"(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

"(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

. . . . .

"(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

"(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government."

To promote compliance with its requirements, the Act contains enforcement and sanctions provisions. If a trial does not begin on time, the defendant may move, before the start of trial or the entry of a guilty plea, to dismiss the charges, and if a meritorious and timely motion to dismiss is filed, the district court must dismiss the charges, though it may choose whether to dismiss with or without prejudice. In making that choice, the court must take into account, among other things, "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Act] and on the administration of justice." §3162(a)(2).

This scheme is designed to promote compliance with the Act without needlessly subverting important criminal prosecutions. The more severe sanction (dismissal with prejudice) is available for use where appropriate, and the knowledge that a violation could potentially result in the imposition of this sanction gives the prosecution a powerful incentive to be careful about compliance. The less severe sanction (dismissal without prejudice) lets the court avoid unduly impairing the enforcement of federal criminal laws—though even this sanction imposes some costs on the prosecution and the court, which further encourages compliance. When an indictment is dismissed without prejudice, the prosecutor may of course seek—and in the great majority of cases will be able to obtain—a new indictment, for even if "the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned . . . within six calendar months of the date of the dismissal." §3288.

With this background in mind, we turn to the questions presented by the unusual procedures followed in this case.

## III

Petitioner contends, and the Government does not seriously dispute, that a defendant may not prospectively waive the application of the Act.[4] We agree.

### A

#### 1

As our discussion above suggests, the Speedy Trial Act comprehensively regulates the time within which a trial must begin. Section 3161(h) specifies in detail numerous categories of delay that are not counted in applying the Act's deadlines. Conspicuously, § 3161(h) has no provision excluding periods of delay during which a defendant waives the application of the Act, and it is apparent from the terms of the Act that this omission was a considered one. Instead of simply allowing defendants to opt out of the Act, the Act demands that defense continuance requests fit within one of the specific exclusions set out in subsection (h). Subsection (h)(8), which permits ends-of-justice continuances, was plainly meant to cover many of these requests. Among the factors that a district court must consider in deciding whether to grant an ends-of-justice continuance are a defendant's need for "reasonable time to obtain counsel," "continuity of counsel," and "effective preparation" of counsel. § 3161(h)(8)(B)(iv). If a defendant could simply waive the application of the Act whenever he or she wanted more time, no defendant would ever need to put such considerations before the court under the rubric of an ends-of-justice exclusion.

The purposes of the Act also cut against exclusion on the grounds of mere consent or waiver. If the Act were designed solely to protect a defendant's right to a speedy trial, it would make sense to allow a defendant to waive the application of the Act. But the Act was designed with the public interest firmly in mind. See, *e. g.*, § 3161(h)(8)(A) (to exclude delay resulting from a continuance—even one "granted . . . at the request of the defendant"—the district court must find "that the ends of justice served . . . outweigh the *best interest of the public* and the defendant *in a speedy trial*" (emphasis added)). That public interest cannot be served, the Act recognizes, if defendants may opt out of the Act entirely.

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[4] We left this question open in *New York* v. *Hill,* 528 U. S. 110, 117, n. 2 (2000).

### 2

This interpretation is entirely in accord with the Act's legislative history. As both the 1974 House and Senate Reports illustrate, the Act was designed not just to benefit defendants but also to serve the public interest by, among other things, reducing defendants' opportunity to commit crimes while on pretrial release and preventing extended pretrial delay from impairing the deterrent effect of punishment. See S. Rep. No. 93–1021, pp. 6–8 (citing "bail problems," offenses committed during pretrial release, and the "seriously undermined . . . deterrent value of the criminal process" as "the debilitating effect[s] of court delay upon our criminal justice system"); H. R. Rep. No. 93–1508, p. 8 ("The purpose of this bill is to assist in reducing crime and the danger of recidivism by requiring speedy trials . . . "). The Senate Report accompanying the 1979 amendments to the Act put an even finer point on it: "[T]he Act seeks to protect and promote speedy trial interests that go beyond the rights of the defendant; although the Sixth Amendment recognizes a societal interest in prompt dispositions, it primarily safeguards the defendant's speedy trial right—which may or may not be in accord with society's." S. Rep. No. 96–212, p. 29; see also *id.*, at 6; H. R. Rep. No. 96–390, p. 3 (1979). Because defendants may be content to remain on pretrial release, and indeed may welcome delay, it is unsurprising that Congress refrained from empowering defendants to make prospective waivers of the Act's application. See S. Rep. No. 96–212, at 29 ("Because of the Act's emphasis on that societal right, a defendant ought not be permitted to waive rights that are not his or hers alone to relinquish").

### B

The District Court reasoned that 18 U. S. C. § 3162(a)(2) supports the conclusion that a defendant may prospectively waive the strictures of the Act. This provision states that "[f]ailure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section." Because this provision in effect allows a defendant to waive a completed violation of the Act (by declining to move to dismiss before the start of trial or the entry of a guilty plea), it follows, so the District Court's reasoning went, that a defendant should be allowed to make a prospective waiver. We disagree.

It is significant that § 3162(a)(2) makes no mention of prospective waivers, and there is no reason to think that Congress wanted to treat prospective and retrospective waivers similarly. Allowing prospective waivers would seriously undermine the Act because there are many cases—like the case at hand—in which the prosecution, the defense, and the court would all be happy to opt out of the Act, to the detriment of the public interest. The sort of retrospective waiver allowed by § 3162(a)(2) does not pose a comparable danger because the prosecution and the court cannot know until the trial actually starts or the guilty plea is actually entered whether the defendant will forgo moving to dismiss. As a consequence, the prosecution and the court retain a strong incentive to make sure that the trial begins on time.

Instead of granting broad opt-out rights, § 3162(a)(2) serves two unrelated purposes. First, § 3162(a)(2) assigns the role of spotting violations of the Act to defendants—for the obvious reason that they have the greatest incentive to perform this task.[5] Second, by requiring that a defendant move before the trial starts or a guilty plea is entered, § 3162(a)(2) both limits the effects of a dismissal without prejudice (by ensuring that an expensive and time-consuming trial will not be mooted by a late-filed motion under the Act) and prevents undue defense gamesmanship.[6]

For these reasons, we reject the District Court's reliance on § 3162(a)(2) and conclude a defendant may not prospectively waive the application of the Act. It follows that petitioner's waiver "for all time" was ineffective. We therefore turn to the Government's alternative grounds in support of the result below.

## IV

### A

The Government contends that because "petitioner's express waiver induced the district court to grant a continuance without making an express ends-of-justice finding . . . , basic principles of judicial estoppel preclude petitioner from enjoying the benefit of the continuance, but then challenging the lack of a finding." Brief for United States 10. In this case, however, we see no basis for applying the doctrine of judicial estoppel.

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[5] The possibility of obtaining a dismissal with prejudice plainly gives a defendant a strong incentive to police compliance, and even if a case is dismissed without prejudice, a defendant may derive some benefit. For example, the time and energy that the prosecution must expend in connection with obtaining a new indictment may be time and energy that the prosecution cannot devote to the preparation of its case.

[6] As noted, in order to promote compliance with the Act, Congress set the minimum permissible penalty at a level that would impose some costs on the prosecution and the court without unduly interfering with the enforcement of the criminal laws. By specifying that a defendant may not move for dismissal once the trial has commenced or a plea has been entered, the amount of inconvenience resulting from a dismissal without prejudice is limited, and defendants are restricted in their ability to use such a motion for strategic purposes. For example, defendants cannot wait to see how a trial is going (or how it comes out) before moving to dismiss.

As this Court has explained:

> " '[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.' *Davis* v. *Wakelee,* 156 U. S. 680, 689 (1895). This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.' *Pegram* v. *Herdrich,* 530 U. S. 211, 227, n. 8 (2000)." *New Hampshire* v. *Maine,* 532 U. S. 742, 749 (2001).

Although this estoppel doctrine is equitable and thus cannot be reduced to a precise formula or test,

> "several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position . . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.,* at 750–751 (citations and internal quotation marks omitted).

In applying this doctrine to the present case, we must first identify the "position" of petitioner's that the Government seeks to enforce. There are three possibilities: (1) petitioner's promise not to move for dismissal under § 3162(a)(2), (2) petitioner's (implied) position that waivers of the Act are enforceable, and (3) petitioner's claim that counsel needed additional time to research the authenticity of the bonds. None of these gives rise to an estoppel.

First, we are unwilling to recognize an estoppel based on petitioner's promise not to move for dismissal because doing so would entirely swallow the Act's no-waiver policy. We see little difference between granting a defendant's request for a continuance in exchange for a promise not to move for dismissal and permitting a prospective waiver, and as we hold above, prospective waivers are inconsistent with the Act.

Second, petitioner's (mistaken) agreement that Speedy Trial Act waivers are valid also does not provide a ground for estoppel. Petitioner did not "succee[d] in persuading" the District Court to accept the proposition that prospective waivers of Speedy Trial Act rights are valid. On the contrary, it was the District Court that requested the waiver and produced the form for petitioner to sign. And while the other relevant factors (clear inconsistency and unfair advantage or detriment) might in isolation support the Government, we think they do not predominate where, as here, the Government itself accepted the District Court's interpretation without objection.

Finally, petitioner's representation to the District Court at the January 31 status conference that a continuance was needed to gather evidence of the bonds' authenticity does not support the Government's estoppel argument because the position that petitioner took then was not "clearly inconsistent" with the position that he now takes in seeking dismissal of the indictment. This would be a different case if petitioner had succeeded in persuading the District Court at the January 31 status conference that the factual predicate for a statutorily authorized exclusion of delay could be established—for example, if defense counsel had obtained a continuance only by falsely representing that he was in the midst of working with an expert who might authenticate the bonds. In fact, however, the discussion at the January 31 status conference did not focus on the requirements of the Act. Rather, the court and the parties proceeded on the assumption that the court's waiver form was valid and that the Act could simply be disregarded. Nothing in the discussion at the conference suggests that the question presented by the defense continuance request was viewed as anything other than a case-management question that lay entirely within the scope of the District Court's discretion. Under these circumstances, the best understanding of the position taken by petitioner's attorney at the January 31 status conference is that granting the requested continuance would represent a sound exercise of the trial judge's discretion in managing its calendar. This position was not "clearly inconsistent" with petitioner's later position that the continuance was not permissible under the terms of the Act. Accordingly, we hold that petitioner is not estopped from challenging the excludability under the Act of the 1997 continuance.

### B

While conceding that the District Court "never made an express finding on the record" about the ends-of-justice balance, Brief for United States 30, the Government argues that such an express finding did not need to be entered contemporaneously—and could be supplied on remand—because, given the circumstances in 1997, the ends-of-justice balance in fact supported the 1997 continuance. We reject this argument. In the first place, the Act requires express findings, and in the second place, it does not permit those findings to be made on remand as the Government proposes.

The Act requires that when a district court grants an ends-of-justice continuance, it must "se[t] forth, in the record of the case, either orally or in writing, its reasons" for finding that the ends of justice are served and they outweigh other interests. 18 U. S. C. § 3161(h)(8)(A). Although the Act is clear that the findings must be made, if only in the judge's mind, before granting the continuance (the continuance can only be "granted . . . on the basis of [the court's] findings"), the Act is ambiguous on precisely when those findings must be "se[t] forth, in the record of the case." However this ambiguity is resolved, at the very least the Act implies that those findings must be put on the record by the time a district court rules on a defendant's motion to dismiss under § 3162(a)(2).[7] In ruling on a defendant's motion to dismiss, the court must tally the unexcluded days. This, in turn, requires identifying the excluded days. But § 3161(h)(8)(A) is explicit that "[n]o . . . period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable . . . unless the court sets forth . . . its reasons for [its] finding[s]." Thus, without on-the-record findings, there can be no exclusion under § 3161(h)(8). Here, the District Court set forth no such findings at the January 31 status conference, and § 3161(h)(8)(A) is not satisfied by the District Court's passing reference to the case's complexity in its ruling on petitioner's motion to dismiss. Therefore, the 1997 continuance is not excluded from the speedy trial clock.

The Government suggests that this error, stemming as it does from the District Court's technical failure to make an express finding, may be regarded as harmless. Brief for United States 31, n. 8. Harmless-error review under Federal Rule of Criminal Procedure 52(a) presumptively applies to "*all* errors where a proper objection is made," *Neder* v. *United States,* 527 U. S. 1, 7 (1999), and we have required "strong support" to find an implied repeal of Rule 52, *United States* v. *Vonn,* 535 U. S. 55, 65 (2002). We conclude, however, that the provisions of the Act provide such support here.

The relevant provisions of the Act are unequivocal. If a defendant pleads not guilty, the trial "*shall* commence" within 70 days "from the filing date (and making public) of the information or indictment" or from the defendant's initial appearance, whichever is later. § 3161(c)(1) (emphasis added). Delay resulting from an ends-of-justice continuance is excluded from this time period, but *"[n]o such period of delay . . . shall be excludable* under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." § 3161(h)(8)(A) (emphasis added). When a trial is not commenced within the prescribed period of time, "the information or indictment *shall be dismissed* on motion of the defendant." § 3162(a)(2) (emphasis added). A straightforward reading of these provisions leads to the conclusion that if a judge fails to make the requisite findings regarding the need for an ends-of-justice continuance, the delay resulting from the continuance must be counted, and if as a result the trial does not begin on time, the indictment or information must be dismissed. The argument that the District Court's failure to make the prescribed findings may be excused as harmless error is hard to square with the Act's categorical terms. See *Alabama* v. *Bozeman,* 533 U. S. 146, 153–154, 155 (2001) (no "'harmless'" or "'technical'" violations of the Interstate Agreement on Detainers' "antishuttling" provision in light of its "absolute language").

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[7] The best practice, of course, is for a district court to put its findings on the record at or near the time when it grants the continuance.

Applying the harmless-error rule would also tend to undermine the detailed requirements of the provisions regulating ends-of-justice continuances. The exclusion of delay resulting from an ends-of-justice continuance is the most open-ended type of exclusion recognized under the Act and, in allowing district courts to grant such continuances, Congress clearly meant to give district judges a measure of flexibility in accommodating unusual, complex, and difficult cases. But it is equally clear that Congress, knowing that the many sound grounds for granting ends-of-justice continuances could not be rigidly structured, saw a danger that such continuances could get out of hand and subvert the Act's detailed scheme. The strategy of § 3161(h)(8), then, is to counteract substantive open-endedness with procedural strictness. This provision demands on-the-record findings and specifies in some detail certain factors that a judge must consider in making those findings. Excusing the failure to make these findings as harmless error would be inconsistent with the strategy embodied in § 3161(h). Such an approach would almost always lead to a finding of harmless error because the simple failure to make a record of this sort is unlikely to affect the defendant's rights. We thus conclude that when a district court makes no findings on the record in support of a § 3161(h)(8) continuance, harmless-error review is not appropriate.

## V

We hold that the 91-day continuance granted on January 31 was not excluded from petitioner's speedy trial clock. Because this continuance by itself exceeded the maximum 70-day delay provided in § 3161(c)(1), the Act was violated, and we need not address whether any other periods of delay during petitioner's case were not excludable. The sanction for a violation of the Act is dismissal, but we leave it to the District Court to determine in the first instance whether dismissal should be with or without prejudice. See § 3162(a)(2). The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I concur in the opinion of the Court with the exception of its discussion of legislative history in Part III–A–2. For reasons I have expressed elsewhere, I believe that the only language that constitutes "a Law" within the meaning of the Bicameralism and Presentment Clause of Article I, § 7, and hence the only language adopted in a fashion that entitles it to our attention, is the text of the enacted statute. See, *e. g., Conroy* v. *Aniskoff,* 507 U. S. 511, 518–528 (1993) (SCALIA, J., concurring in judgment). Here, the Court looks to legislative history even though the remainder of its opinion amply establishes that the Speedy Trial Act is unambiguous. The Act's language rejects the possibility of a prospective waiver, and even expresses the very point that the Court relies on legislative history to support—that the Act protects the interests of the public as well as those of the defendant. See *ante,* at 500–501 (citing 18 U. S. C. § 3161(h)(8)(A)). Use of legislative history in this context thus conflicts not just with my own views but with this Court's repeated statements that when the language of the statute is plain, legislative history is irrelevant. See, *e. g., United States* v. *Gonzales,* 520 U. S. 1, 6 (1997). "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat. Bank* v. *Germain,* 503 U. S. 249, 253–254 (1992) (citations and internal quotation marks omitted).

It may seem that there is no harm in using committee reports and other such sources when they are merely in accord with the plain meaning of the Act. But this sort of intellectual piling-on has addictive consequences. To begin with, it accustoms us to believing that what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole—so that we sometimes even will say (when referring to a floor statement and committee report) that "Congress has expressed" thus-and-so. See, *e. g., Conroy, supra,* at 516–517. There is no basis either in law or in reality for this naive belief. Moreover, if legislative history is relevant when it confirms the plain meaning of the statutory text, it should also be relevant when it contradicts the plain meaning, thus rendering what is plain ambiguous. Because the use of legislative history is illegitimate and ill advised in the interpretation of any statute—and especially a statute that is clear on its face—I do not join this portion of the Court's opinion.

# WHITMAN *v.* DEPARTMENT OF TRANSPORTATION ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–1131. Argued December 5, 2005—Decided June 5, 2006

Without first pursuing his collective-bargaining agreement's grievance procedures, petitioner filed suit alleging that his constitutional rights and 49 U. S. C. § 45104(8) were violated when his employer, the Federal Aviation Administration (FAA), tested him for drugs and alcohol in a nonrandom manner. The District Court held that it had no jurisdiction to consider petitioner's claims under the Civil Service Reform Act of 1978 (CSRA), whose grievance rules the FAA has adopted. In affirming, the Ninth Circuit stated that petitioner's claims were precluded because 5 U. S. C. § 7121(a)(1) did not confer federal-court jurisdiction.

*Held:* This case is remanded for the Ninth Circuit to address whether the FAA's actions constituted a "prohibited personnel practice," see 5 U. S. C. § 2302(b); 49 U. S. C. § 40122(g)(2)(A), as well as to address the ultimate preclusion issue. The question is not whether 5 U. S. C. § 7121 confers jurisdiction, but whether it removes the jurisdiction given to the federal courts or otherwise precludes employees from pursuing remedies beyond those set out in the CSRA. Deciding the jurisdiction and preclusion questions requires ascertaining where petitioner's claims fit within the statutory scheme, as the CSRA provides different treatment for grievances depending on the nature of the claim. The Ninth Circuit did not decide whether petitioners' allegations state a "prohibited personnel practice." Other issues raised in this Court, but not decided below—*e. g.*, whether petitioner has challenged final agency action—may also be addressed on remand, for a decision on those issues can obviate the need to decide the more difficult preclusion question.

382 F. 3d 938, vacated and remanded.

*Pamela S. Karlan* argued the cause for petitioner. With her on the briefs were *Thomas C. Goldstein, Amy Howe*, and *Kevin K. Russell.*

*Malcolm L. Stewart* argued the cause for respondents. With him on the brief were *Solicitor General Clement, Assistant Attorney General Keisler, Deputy Solicitor General Kneedler, John P. Elwood, William Kanter, Jeffrey A.*

*Rosen, Paul M. Geier, Jerome M. Mellody, Mark A. Robbins, Steven E. Abow,* and *Robin M. Richardson.**

Per Curiam.

Terry Whitman, the petitioner, is an employee of the Federal Aviation Administration (FAA) and is subject to the agency's drug and alcohol testing program. Without first seeking to pursue grievance procedures under his collective-bargaining agreement, he filed suit in the United States District Court for the District of Alaska, alleging the FAA tested him in a nonrandom manner, in violation of his constitutional rights and 49 U. S. C. § 45104(8).

The FAA has its own procedural framework for the resolution of claims by its employees; and for this purpose it adopts certain sections of the Civil Service Reform Act of 1978 (CSRA), including Chapter 71 of Title 5, which sets forth the rules for grievances. 49 U. S. C. § 40122(g)(2)(C). The District Court held that, under the provisions of the CSRA, it was without jurisdiction to consider the petitioner's claims. The Court of Appeals for the Ninth Circuit affirmed, stating that because "5 U. S. C. § 7121(a)(1), as amended in 1994, does not expressly confer federal court jurisdiction over employment-related claims covered by the negotiated grievance procedures of federal employees' collective bargaining agreements," his claims are precluded. 382 F. 3d 938, 939 (2004). This Court granted certiorari to review the judgment. 545 U. S. 1138 (2005).

The Court of Appeals was correct to say that 5 U. S. C. § 7121(a)(1) does not confer jurisdiction. Another statute, however—a very familiar one—grants jurisdiction to the

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*Briefs of *amici curiae* urging reversal were filed for the American Federation of Government Employees et al. by *Thomas S. Williamson, Jr., Sarah L. Wilson, Mark D. Roth,* and *Gony Frieder;* for the National Treasury Employees Union by *Gregory O'Duden, Elaine D. Kaplan,* and *Barbara A. Atkin;* and for Allen Dotson by *Amanda Frost* and *Brian Wolfman.*

federal courts over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U. S. C. § 1331. The question, then, is not whether 5 U. S. C. § 7121 confers jurisdiction, but whether § 7121 (or the CSRA as a whole) removes the jurisdiction given to the federal courts, see *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, 642 (2002) (holding that "even if [47 U. S. C.] § 252(e)(6) does not *confer* jurisdiction, it at least does not *divest* the district courts of their authority under 28 U. S. C. § 1331 to review the Commission's order for compliance with federal law"), or otherwise precludes employees from pursuing remedies beyond those set out in the CSRA, cf. *United States* v. *Fausto*, 484 U. S. 439, 443–444 (1988); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967) ("The question is phrased in terms of 'prohibition' rather than 'authorization' because . . . judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress").

In deciding the question of jurisdiction and preclusion, the Court would be required first to ascertain where Whitman's claims fit within the statutory scheme, as the CSRA provides different treatment for grievances depending on the nature of the claim. It may be, for example, that the FAA's actions, as described by the petitioner, constitute a "prohibited personnel practice." See 5 U. S. C. § 2302(b); 49 U. S. C. § 40122(g)(2)(A). Both the petitioner and the Government say they do not, but because the ultimate question may be jurisdictional, this concession ought not to be accepted out of hand. See *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U. S. 645, 652 (1973) ("Parties, of course, cannot confer jurisdiction; only Congress can do so"). The Court of Appeals did not decide whether the petitioner's allegations state a "prohibited personnel practice." The proper course, then, is to remand for the Court of Appeals to address the matter, see *National Collegiate Athletic Assn.* v. *Smith*, 525

U. S. 459, 470 (1999), as well as the ultimate issue of preclusion. The various other issues raised before this Court, but not decided below, may also be addressed on remand, including: whether the petitioner has challenged final agency action; whether the petitioner has exhausted his administrative remedies; whether exhaustion is required given this statutory scheme and the Administrative Procedure Act, as interpreted in *Darby* v. *Cisneros,* 509 U. S. 137 (1993); and whether the Government has forfeited its exhaustion-of-remedies argument. It may be that a decision on these questions can obviate the need to decide a more difficult question of preclusion.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE ALITO took no part in the consideration or decision of this case.

# MOHAWK INDUSTRIES, INC. *v.* WILLIAMS ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05–465. Argued April 26, 2006—Decided June 5, 2006

Certiorari limited to Question 1 dismissed; certiorari granted; 411 F. 3d 1252, vacated and remanded.

*Carter G. Phillips* argued the cause for petitioner. With him on the briefs were *Richard D. Bernstein, Juan P. Morillo,* and *Steven T. Cottreau.*

*Howard W. Foster* argued the cause for respondents. With him on the brief were *John E. Floyd, Joshua F. Thorpe, Ronan P. Doherty, Bobby Lee Cook,* and *Matthew Thames.*

*Malcolm L. Stewart* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Clement, Assistant Attorney General Fisher, Deputy Solicitor General Dreeben,* and *Sangita K. Rao.**

PER CURIAM.

The writ of certiorari limited to Question 1 presented by the petition, granted at 546 U. S. 1075 (2005), is dismissed as improvidently granted. The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Elev-

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Beth S. Brinkmann, Seth M. Galanter, Alison Tucher, Robin S. Conrad,* and *Amar D. Sarwal;* and for the National Association of Manufacturers et al. by *Michael J. Mueller, Jan S. Amundson,* and *Quentin Riegel.*

Briefs of *amici curiae* urging affirmance were filed for the Immigration Political Action Committee et al. by *Barnaby W. Zall;* and for the National Association of Shareholder and Consumer Attorneys by *Kevin P. Roddy* and *G. Robert Blakey.*

enth Circuit for further consideration in light of *Anza* v. *Ideal Steel Supply Corp., ante,* p. 451.

*It is so ordered.*

# HOUSE *v.* BELL, WARDEN

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04–8990. Argued January 11, 2006—Decided June 12, 2006

A Tennessee jury convicted petitioner House of Carolyn Muncey's murder and sentenced him to death. The State's case included evidence that FBI testing showed semen consistent (or so it seemed) with House's on Mrs. Muncey's clothing and small bloodstains consistent with her blood but not House's on his jeans. In the sentencing phase, the jury found, *inter alia*, the aggravating factor that the murder was committed while House was committing, attempting to commit, or fleeing from the commission of rape or kidnaping. In affirming, the State Supreme Court described the evidence as circumstantial but strong. House was denied state postconviction relief. Subsequently, the Federal District Court denied habeas relief, deeming House's claims procedurally defaulted and granting the State summary judgment on most of his claims. It also found, after an evidentiary hearing at which House attacked the blood and semen evidence and presented other evidence, including a putative confession, suggesting that Mr. Muncey committed the crime, that House did not fall within the "actual innocence" exception to procedural default recognized in *Schlup* v. *Delo*, 513 U. S. 298, and *Sawyer* v. *Whitley*, 505 U. S. 333. The Sixth Circuit ultimately affirmed.

*Held:*

1. Because House has made the stringent showing required by the actual-innocence exception, his federal habeas action may proceed. Pp. 536–554.

(a) To implement the general principle that "comity and finality . . . 'must yield to the imperative of correcting a fundamentally unjust incarceration,'" *Murray* v. *Carrier*, 477 U. S. 478, 495, this Court has ruled that prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt," *Schlup*, 513 U. S., at 327. Several features of *Schlup*'s standard bear emphasis here. First, while the gateway claim requires "new reliable evidence . . . not presented at trial," *id.*, at 324, the habeas court must assess the likely impact of "'all the evidence'" on reasonable jurors, *id.*, at 327–329. Second, rather than requiring absolute certainty about guilt or innocence, a petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt. Finally, this standard is "by no means equivalent to the standard of *Jackson* v. *Virginia*, 443 U. S. 307," which governs insufficient evidence claims, *id.*, at 330. Rather, because a *Schlup* claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record. See *ibid.* Contrary to the State's arguments, the standard of review in two provisions of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U. S. C. §§2244(b)(2)(B)(ii) and 2254(e)(2), is inapplicable here. In addition, because the standard does not address a "district court's independent judgment as to whether reasonable doubt exists," *Schlup*, *supra*, at 329, a ruling in House's favor does not require the showing of clear error as to the District Court's specific findings. It is with these principles in mind that the evidence developed in House's federal habeas proceedings should be evaluated. Pp. 536–540.

(b) In direct contradiction of evidence presented at trial, DNA testing has established that semen on Mrs. Muncey's clothing came from her husband, not House. While the State claims that the evidence is immaterial since neither sexual contact nor motive were elements of the offense at the guilt phase, this Court considers the new disclosure of central importance. This case is about who committed the crime, so motive is key, and the prosecution at the guilt phase referred to evidence at the scene suggesting that House committed, or attempted to commit, an indignity on Mrs. Muncey. Apart from proving motive, this was the only forensic evidence at the scene that would link House to the murder. Law and society demand accountability for a sexual offense, so the evidence was also likely a factor in persuading the jury not to let him go free. At sentencing, moreover, the jury concluded that the murder was committed in the course of a rape or kidnaping. A jury acting without the assumption that the semen could have come from House would have found it necessary to establish some different motive, or, if the same motive, an intent far more speculative. Pp. 540–541.

(c) The evidentiary disarray surrounding the other forensic evidence, the bloodstains on House's pants, taken together with the testimony of an Assistant Chief Medical Examiner for the State of Tennessee, would prevent reasonable jurors from placing significant reliance on the blood evidence. The medical examiner who testified believes the blood on the jeans must have come from the autopsy samples. In addition, a vial and a quarter of autopsy blood is unaccounted for; the blood was transported to the FBI together with the pants in conditions that could have caused the vials to spill; some blood did spill at least once during the blood's journey from Tennessee authorities through FBI hands to a defense expert; the pants were stored in a plastic bag bearing a large bloodstain and a label from a Tennessee Bureau of Investigation agent; and the box containing the blood samples may have been opened before arriving at the FBI lab. None of this evidence was presented to the trial jury. Whereas the bloodstains seemed strong evidence of House's guilt at trial, the record now raises substantial questions about the blood's origin. Pp. 541–548.

(d) In the post-trial proceedings, House presented troubling evidence that Mr. Muncey could have been the murderer. Two witnesses described a confession by Mr. Muncey; two others described suspicious behavior (a fight between the couple and Mr. Muncey's attempt to construct a false alibi) around the time of the crime; and others described a history of spousal abuse. Considered in isolation, a reasonable jury might well disregard this evidence, but in combination with the challenges to the blood evidence and lack of motive with respect to House, evidence pointing to Mr. Muncey likely would reinforce other doubts as to House's guilt. Pp. 548–553.

(e) The Assistant Chief Medical Examiner further testified that certain injuries discovered on House after the crime likely did not result from involvement in the murder. Certain other evidence—Mrs. Muncey's daughter's recollection of the night of the murder, and the District Court's finding at the habeas proceeding that House was not a credible witness—may favor the State. P. 553.

(f) While this is not a case of conclusive exoneration, and the issue is close, this is the rare case where—had the jury heard all the conflicting testimony—it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt. Pp. 553–554.

2. House has not shown freestanding innocence that would render his imprisonment and planned execution unconstitutional under *Herrera* v. *Collins*, 506 U. S. 390, in which the Court assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim," *id.*, at 417. The threshold showing for such a right would be extraordinarily high, and House has not satisfied whatever burden a hypothetical freestanding innocence claim would require. He has cast doubt on his guilt sufficient to satisfy *Schlup*'s gateway standard for obtaining federal review, but given the closeness of the *Schlup* question here, his showing falls short of the threshold implied in *Herrera*. Pp. 554–555.

386 F. 3d 668, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. ROBERTS, C. J., filed an opinion concurring in the judgment in part and dissenting in part, in which SCALIA and THOMAS, JJ., joined, *post*, p. 555. ALITO, J., took no part in the consideration or decision of the case.

*Stephen Michael Kissinger* argued the cause for petitioner. With him on the briefs were *George H. Kendall, Theodore M. Shaw,* and *Jacqueline A. Berrien.*

*Jennifer L. Smith,* Associate Deputy Attorney General of Tennessee, argued the cause for respondent. With her on the brief were *Paul G. Summers,* Attorney General, *Michael E. Moore,* Solicitor General, *Gordon W. Smith,* Associate Solicitor General, and *Alice B. Lustre.**

JUSTICE KENNEDY delivered the opinion of the Court.

Some 20 years ago in rural Tennessee, Carolyn Muncey was murdered. A jury convicted petitioner Paul Gregory House of the crime and sentenced him to death, but new revelations cast doubt on the jury's verdict. House, protesting his innocence, seeks access to federal court to pursue habeas corpus relief based on constitutional claims that are procedurally barred under state law. Out of respect for the finality of state-court judgments federal habeas courts, as a general rule, are closed to claims that state courts would consider defaulted. In certain exceptional cases involving a compelling claim of actual innocence, however, the state procedural default rule is not a bar to a federal habeas corpus petition. See *Schlup* v. *Delo*, 513 U. S. 298, 319–322 (1995). After careful review of the full record, we conclude that House has made the stringent showing required by this exception; and we hold that his federal habeas action may proceed.

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Michael S. Greco, Rory K. Little,* and *Seth P. Waxman;* for Former Prosecutors et al. by *Andrew H. Schapiro, Timothy C. Lambert, George H. Kendall,* and *Miriam Gohara;* and for the Innocence Project, Inc., by *David Goldberg.*

A brief of *amici curiae* urging affirmance was filed for the State of California et al. by *Bill Lockyer,* Attorney General of California, *Manuel M. Medeiros,* State Solicitor General, *Robert R. Anderson,* Chief Assistant Attorney General, *Mary Jo Graves,* Senior Assistant Attorney General, *Patrick J. Whalen,* Deputy Attorney General, and *Ward A. Campbell,* Supervising Deputy Attorney General, by *Christopher L. Morano,* Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Mike Beebe* of Arkansas, *John W. Suthers* of Colorado, *M. Jane Brady* of Delaware, *Charles J. Crist, Jr.,* of Florida, *Lawrence G. Wasden* of Idaho, *Phill Kline* of Kansas, *Charles C. Foti, Jr.,* of Louisiana, *Jim Hood* of Mississippi, *Mike McGrath* of Montana, *Thomas W. Corbett, Jr.,* of Pennsylvania, *Lawrence E. Long* of South Dakota, *Greg Abbott* of Texas, and *Rob McKenna* of Washington.

## I

We begin with the facts surrounding Mrs. Muncey's disappearance, the discovery of her body, and House's arrest. Around 3 p.m. on Sunday, July 14, 1985, two local residents found her body concealed amid brush and tree branches on an embankment roughly 100 yards up the road from her driveway. Mrs. Muncey had been seen last on the evening before, when, around 8 p.m., she and her two children—Lora Muncey, aged 10, and Matthew Muncey, aged 8—visited their neighbor, Pam Luttrell. According to Luttrell, Mrs. Muncey mentioned her husband, William Hubert Muncey, Jr., known in the community as "Little Hube" and to his family as "Bubbie." As Luttrell recounted Mrs. Muncey's comment, Mr. Muncey "had gone to dig a grave, and he hadn't come back, but that was all right, because [Mrs. Muncey] was going to make him take her fishing the next day," App. 11–12. Mrs. Muncey returned home, and some time later, before 11 p.m. at the latest, Luttrell "heard a car rev its motor as it went down the road," something Mr. Muncey customarily did when he drove by on his way home. Record, Addendum 4, 5 Tr. of Evidence in No. 378 (Crim. Ct. Union Cty., Tenn.), pp. 641–642 (hereinafter Tr.). Luttrell then went to bed.

Around 1 a.m., Lora and Matthew returned to Luttrell's home, this time with their father, Mr. Muncey, who said his wife was missing. Muncey asked Luttrell to watch the children while he searched for his wife. After he left, Luttrell talked with Lora. According to Luttrell:

> "[Lora] said she heard a horn blow, she thought she heard a horn blow, and somebody asked if Bubbie was home, and her mama, you know, told them—no. And then she said she didn't know if she went back to sleep or not, but then she heard her mama going down the steps crying and I am not sure if that is when that she told me that she heard her mama say—oh God, no, not me, or if she told me that the next day, but I do know that she said she heard her mother going down the steps crying." App. 14–15.

While Lora was talking, Luttrell recalled, "Matt kept butting in, you know, on us talking, and he said—sister they said daddy had a wreck, they said daddy had a wreck." *Id.*, at 13.

At House's trial, Lora repeated her account of the night's events, this time referring to the "wreck" her brother had mentioned. To assist in understanding Lora's account, it should be noted that Mrs. Muncey's father-in-law—Little Hube's father—was sometimes called "Big Hube." Lora and her brother called him "Paw Paw." We refer to him as Mr. Muncey, Sr. According to Lora, Mr. Muncey, Sr., had a deep voice, as does petitioner House.

Lora testified that after leaving Luttrell's house with her mother, she and her brother "went to bed." *Id.*, at 18. Later, she heard someone, or perhaps two different people, ask for her mother. Lora's account of the events after she went to bed was as follows:

> "Q Laura *[sic]*, at some point after you got back home and you went to bed, did anything happen that caused your mother to be upset or did you hear anything?
>
> "A Well, it sounded like PawPaw said—where's daddy at, and she said digging a grave.

> "Q Okay. Do you know if it was PawPaw or not, or did it sound like PawPaw?
>
> "A It just sounded like PawPaw.
>
> "Q And your mother told him what?
>
> "A That he was digging a grave.
>
> "Q Had you ever heard that voice before that said that?
>
> "A I don't remember.
>
> "Q After that, at some point later, did you hear anything else that caused your mother to be upset?
>
> "A Well, they said that daddy had a wreck down the road and she started crying—next to the creek.
>
> "Q Your mother started crying. What was it that they said?
>
> "A That daddy had a wreck.
>
> "Q Did they say where?
>
> "A Down there next to the creek." *Id.*, at 18–19.

Lora did not describe hearing any struggle. Some time later, Lora and her brother left the house to look for their mother, but no one answered when they knocked at the Luttrells' home, and another neighbor, Mike Clinton, said he had not seen her. After the children returned home, according to Lora, her father came home and "fixed him a bologna sandwich and he took a bit of it and he says—sissy, where is mommy at, and I said—she ain't been here for a little while." *Id.*, at 20. Lora recalled that Mr. Muncey went outside and, not seeing his wife, returned to take Lora and Matthew to the Luttrells' so that he could look further.

The next afternoon Billy Ray Hensley, the victim's first cousin, heard of Mrs. Muncey's disappearance and went to look for Mr. Muncey. As he approached the Munceys' street, Hensley allegedly "saw Mr. House come out from under a bank, wiping his hands on a black rag." *Id.*, at 32. Just when and where Hensley saw House, and how well he could have observed him, were disputed at House's trial. Hensley admitted on cross-examination that he could not have seen House "walking up or climbing up" the embankment, *id.*, at 39; rather, he saw House, in "[j]ust a glance," *id.*, at 40, "appear out of nowhere," "next to the embankment," *id.*, at 39. On the Munceys' street, opposite the area where Hensley said he saw House, a white Plymouth was parked near a sawmill. Another witness, Billy Hankins, whom the defense called, claimed that around the same time he saw a "boy" walking down the street away from the parked Plymouth and toward the Munceys' home. This witness, however, put the "boy" on the side of the street with the parked car and the Munceys' driveway, not the side with the embankment.

Hensley, after turning onto the Munceys' street, continued down the road and turned into their driveway. "I pulled up in the driveway where I could see up toward Little Hube's house," Hensley testified, "and I seen Little Hube's car wasn't there, and I backed out in the road, and come back [the other way]." *Id.*, at 32. As he traveled up the road, Hensley saw House traveling in the opposite direction in the white Plymouth. House "flagged [Hensley] down" through his windshield, *ibid.*, and the two cars met about 300 feet up the road from the Munceys' driveway. According to Hensley, House said he had heard Mrs. Muncey was missing and was looking for her husband. *Id.*, at 33. Though House had only recently moved to the area, he was acquainted with the Munceys, had attended a dance with them, and had visited their home. He later told law enforcement officials he considered both of the Munceys his friends. According to Hensley, House said he had heard that Mrs. Muncey's husband, who was an alcoholic, was elsewhere "getting drunk." *Ibid.*

As Hensley drove off, he "got to thinking to [him]self—he's hunting Little Hube, and Little Hube drunk—what would he be doing off that bank . . . ." *Ibid.* His suspicion aroused, Hensley later returned to the Munceys' street with a friend named Jack Adkins. The two checked different spots on the embankment, and though Hensley saw nothing where he looked, Adkins found Mrs. Muncey. Her body lay across from the sawmill near the corner where House's car had been parked, dumped in the woods a short way down the bank leading toward a creek.

Around midnight, Dr. Alex Carabia, a practicing pathologist and county medical examiner, performed an autopsy. Dr. Carabia put the time of death between 9 and 11 p.m. Mrs. Muncey had a black eye, both her hands were bloodstained up to the wrists, and she had bruises on her legs and neck. Dr. Carabia described the bruises as consistent with a "traumatic origin," *i. e.*, a fight or a fall on hard objects. 7 Tr. 985–986. Based on the neck bruises and other injuries, he concluded Mrs. Muncey had been choked, but he ruled this out as the cause of death. The cause of death, in Dr. Carabia's view, was a severe blow to the left forehead that inflicted both a laceration penetrating to the bone and, inside the skull, a severe right-side hemorrhage, likely caused by Mrs. Muncey's brain slamming into the skull opposite the impact. Dr. Carabia described this head injury as consistent either with receiving a blow from a fist or other instrument or with striking some object.

The county sheriff, informed about Hensley's earlier encounter with House, questioned House shortly after the body was found. That evening, House answered further questions during a voluntary interview at the local jail. Special Agent Ray Presnell of the Tennessee Bureau of Investigation (TBI) prepared a statement of House's answers, which House signed. Asked to describe his whereabouts on the previous evening, House claimed—falsely, as it turned out—that he spent the entire evening with his girlfriend, Donna Turner, at her trailer. Asked whether he was wearing the same pants he had worn the night before, House replied—again, falsely—that he was. House was on probation at the time, having recently been released on parole following a sentence of five years to life for aggravated sexual assault in

Utah. House had scratches on his arms and hands, and a knuckle on his right ring finger was bruised. He attributed the scratches to Turner's cats and the finger injury to recent construction work tearing down a shed. The next day House gave a similar statement to a different TBI agent, Charles Scott.

In fact House had not been at Turner's home. After initially supporting House's alibi, Turner informed authorities that House left her trailer around 10:30 or 10:45 p.m. to go for a walk. According to Turner's trial testimony, House returned later—she was not sure when—hot and panting, missing his shirt and his shoes. House, Turner testified, told her that while he was walking on the road near her home, a vehicle pulled up beside him, and somebody inside "called him some names and then they told him he didn't belong here anymore." App. 89. House said he tried to ignore the taunts and keep walking, but the vehicle pulled in behind him, and "one of them got out and grabbed him by the shoulder . . . and [House] swung around with his right hand" and "hit something." *Ibid.* According to Turner, House said "he took off down the bank and started running and he said that he—he said it seemed forever where he was running. And he said they fired two shots at him while he took off down the bank . . . ." *Ibid.* House claimed the assailants "grabbed ahold of his shirt," which Turner remembered as "a blue tank top, trimmed in yellow," and "they tore it to where it wouldn't stay on him and he said—I just throwed it off when I was running." *Id.*, at 91. Turner, noticing House's bruised knuckle, asked how he hurt it, and House told her "that's where he hit." *Id.*, at 90. Turner testified that she "thought maybe my ex-husband had something to do with it." *Ibid.*

Although the white Plymouth House drove the next day belonged to Turner, Turner insisted House had not used the car that night. No forensic evidence connected the car to the crime; law enforcement officials inspected a white towel covering the driver seat and concluded it was clean. Turner's trailer was located just under two miles by road, through hilly terrain, from the Muncey residence.

Law enforcement officers also questioned the victim's husband. Though Mrs. Muncey's comments to Luttrell gave no indication she knew this, Mr. Muncey had spent the evening at a weekly dance at a recreation center roughly a mile and a half from his home. In his statement to law enforcement—a statement House's trial counsel claims he never saw—Mr. Muncey admitted leaving the dance early, but said it was only for a brief trip to the package store to buy beer. He also stated that he and his wife had had sexual relations Saturday morning.

Late in the evening on Monday, July 15—two days after the murder—law enforcement officers visited Turner's trailer. With Turner's consent, Agent Scott seized the pants House was wearing the night Mrs. Muncey disappeared. The heavily soiled pants were sitting in a laundry hamper; years later, Agent Scott recalled noticing "reddish brown stains" he "suspected" were blood. *Id.*, at 274–275. Around 4 p.m. the next day, two local law enforcement officers set out for the Federal Bureau of Investigation in Washington, D. C., with House's pants, blood samples from the autopsy, and other evidence packed together in a box. They arrived at 2 a.m. the next morning. On July 17, after initial FBI testing revealed human blood on the pants, House was arrested.

## II

The State of Tennessee charged House with capital murder. At House's trial, the State presented testimony by Luttrell, Hensley, Adkins, Lora Muncey, Dr. Carabia, the sheriff, and other law enforcement officials. Through TBI Agents Presnell and Scott, the jury learned of House's false statements. Central to the State's case, however, was what the FBI testing showed—that semen consistent (or so it seemed) with House's was present on Mrs. Muncey's nightgown and panties, and that small bloodstains consistent with Mrs. Muncey's blood but not House's appeared on the jeans belonging to House.

Regarding the semen, FBI Special Agent Paul Bigbee, a serologist, testified that the source was a "secretor," meaning someone who "secrete[s] the ABO blood group substances in other body fluids, such as semen and saliva"—a characteristic shared by 80 percent of the population, including House. *Id.*, at 55. Agent Bigbee further testified that the source of semen on the gown was blood-type A, House's own blood type. As to the semen on the panties, Agent Bigbee found only the H blood-group substance, which A and B blood-type secretors secrete along with substances A and B, and which O-type secretors secrete exclusively. Agent Bigbee explained, however—using science an *amicus* here sharply disputes, see Brief for Innocence Project, Inc., as *Amicus Curiae* 24–26—that House's A antigens could have "degraded" into H, App. 57–58. Agent Bigbee thus concluded that both semen deposits could have come from House, though he acknowledged that the H antigen could have come from Mrs. Muncey herself if she was a secretor—something he "was not able to determine," *id.*, at 58—and that, while Mr. Muncey was himself blood-type A (as was his wife), Agent Bigbee was again "not able to determine his secretor status," *id.*, at 57. Agent Bigbee acknowledged on cross-examination that "a saliva sample" would have sufficed to determine whether Mr. Muncey was a secretor; the State did not provide such a sample, though it did provide samples of Mr. Muncey's blood. *Id.*, at 62.

As for the blood, Agent Bigbee explained that "spots of blood" appeared "on the left outside leg, the right bottom cuff, on the left thigh and in the right inside pocket and on the lower pocket on the outside." *Id.*, at 48. Agent Bigbee determined that the blood's source was type A (the type shared by House, the victim, and Mr. Muncey). He also successfully tested for the enzyme phosphoglucomutase and the blood serum haptoglobin, both of which "are found in all humans" and carry "slight chemical differences" that vary genetically and "can be grouped to differentiate between two individuals if those types are different." *Id.*, at 49–50. Based on these chemical traces and on the A blood type, Agent Bigbee determined that only some 6.75 percent of the population carry similar blood, that the blood was "consistent" with Mrs. Muncey's (as determined by testing autopsy samples), and that it was "impossible" that the blood came from House. *Id.*, at 48–52.

A different FBI expert, Special Agent Chester Blythe, testified about fiber analysis performed on Mrs. Muncey's clothes and on House's pants. Although Agent Blythe found blue jean fibers on Mrs. Muncey's nightgown, brassiere, housecoat, and panties, and in fingernail scrapings taken from her body (scrapings that also contained trace, unidentifiable amounts of blood), he acknowledged that, as the prosecutor put it in questioning the witness, "blue jean material is common material," so "this doesn't mean that the fibers that were all over the victim's clothing were necessarily from [House's] pair of blue jeans." 6 Tr. 864–865. On House's pants, though cotton garments both transfer and retain fibers readily, Agent Blythe found neither hair nor fiber consistent with the victim's hair or clothing.

In the defense case House called Hankins, Clinton, and Turner, as well as House's mother, who testified that House had talked to her by telephone around 9:30 p.m. on the night of the murder and that he had not used her car that evening. House also called the victim's brother, Ricky Green, as a witness. Green testified that on July 2, roughly two weeks before the murder, Mrs. Muncey called him and "said her and Little Hube had been into it and she said she was wanting to leave Little Hube, she said she was wanting to get out—out of it, and she was scared." 7 *id.*, at 1088. Green recalled that at Christmastime in 1982 he had seen Mr. Muncey strike Mrs. Muncey after returning home drunk.

As Turner informed the jury, House's shoes were found several months after the crime in a field near her home. Turner delivered them to authorities. Though the jury did not learn of this fact (and House's counsel claims he did not either), the State tested the shoes for blood and found none. House's shirt was not found.

The State's closing argument suggested that on the night of her murder, Mrs. Muncey "was deceived . . . . She had been told [her husband] had had an accident." 9 *id.*, at 1226. The prosecutor emphasized the FBI's blood analysis, noting that "after running many, many, many tests," Agent Bigbee

> "was able to tell you that the blood on the defendant's blue jeans was not his own blood, could not be his own blood. He told you that the blood on the blue jeans was consistent with every characteristic in every respect of the deceased's, Carolyn Muncey's, and that ninety-three (93%) percent of the white population would not have that blood type. . . . He can't tell you one hundred (100%) percent for certain that it was her blood. But folks, he can sure give you a pretty good—a pretty good indication." *Id.*, at 1235–1236.

In the State's rebuttal, after defense counsel questioned House's motive "to go over and kill a woman that he barely knew[,] [w]ho was still dressed, still clad in her clothes," *id.*, at 1274, the prosecutor referred obliquely to the semen stains. While explaining that legally "it does not make any difference under God's heaven, what the motive was," App. 106, the prosecutor told the jury, "you may have an idea why he did it," *ibid.:*

> "The evidence at the scene which seemed to suggest that he was subjecting this lady to some kind of indignity, why would you get a lady out of her house, late at night, in her night clothes, under the trick that her husband has had a wreck down by the creek? . . . Well, it is because either you don't want her to tell what indigni-

> ties you have subjected her to, or she is unwilling and fights against you, against being subjected to those indignities. In other words, it is either to keep her from telling what you have done to her, or it is that you are trying to get her to do something that she nor any mother on that road would want to do with Mr. House, under those conditions, and you kill her because of her resistance. That is what the evidence at the scene suggests about motive." *Id.*, at 106–107.

In addition the government suggested the black rag Hensley said he saw in House's hands was in fact the missing blue tank top, retrieved by House from the crime scene. And the prosecution reiterated the importance of the blood. "[D]efense counsel," he said, "does not start out discussing the fact that his client had blood on his jeans on the night that Carolyn Muncey was killed. . . . He doesn't start with the fact that nothing that the defense has introduced in this case explains what blood is doing on his jeans, all over his jeans, that is scientifically, completely different from his blood." *Id.*, at 104–105. The jury found House guilty of murder in the first degree.

The trial advanced to the sentencing phase. As aggravating factors to support a capital sentence, the State sought to prove: (1) that House had previously been convicted of a felony involving the use or threat of violence; (2) that the homicide was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (3) that the murder was committed while House was committing, attempting to commit, or fleeing from the commission of, rape or kidnaping. See Tenn. Code Ann. §§ 39–2–203(i)(2), (5), (7) (1982) (repealed 1989); cf. §§ 39–13–204(i)(2), (5), (7) (2003). After presenting evidence of House's parole status and aggravated sexual assault conviction, the State rested. As mitigation, the defense offered testimony from House's father and mother, as well as evidence, presented through House's mother, that House attempted suicide after the guilt-phase verdict. Before the attempt House wrote his mother a letter professing his innocence.

In closing the State urged the jury to find all three aggravating factors and impose death. As to the kidnaping or rape factor, the prosecution suggested Mrs. Muncey was "decoy[ed] or entic[ed] . . . away from her family, and confin[ed] against her will because you know that as she was being beaten to death." 10 Tr. 1410. "We also think," the prosecutor added, "the proof shows strong evidence of attempted sexual molestation of the victim to accompany the taking away and murdering her." *Id.*, at 1410–1411. Later the prosecutor argued, "I think the proof shows in the record that it is more likely than not that having been through the process before and having been convicted of a crime involving the threat of violence, or violence to another person, aggravated sexual assault, that the defendant cannot benefit from the type of rehabilitation that correction departments can provide." *Id.*, at 1413. The jury unanimously found all three aggravating factors and concluded "there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances." *Id.*, at 1454. The jury recommended a death sentence, which the trial judge imposed.

## III

The Tennessee Supreme Court affirmed House's conviction and sentence, describing the evidence against House as "circumstantial" but "quite strong." *State* v. *House*, 743 S. W. 2d 141, 143, 144 (1987). Two months later, in a state trial court, House filed a *pro se* petition for postconviction relief, arguing he received ineffective assistance of counsel at trial. The court-appointed counsel amended the petition to raise other issues, including a challenge to certain jury instructions. At a hearing before the same judge who conducted the trial, House's counsel offered no proof beyond the trial transcript. The trial court dismissed the petition, deeming House's trial counsel adequate and overruling

House's other objections. On appeal House's attorney renewed only the jury-instructions argument. In an unpublished opinion the Tennessee Court of Criminal Appeals affirmed, and both the Tennessee Supreme Court and this Court, *House* v. *Tennessee*, 498 U. S. 912 (1990), denied review.

House filed a second postconviction petition in state court reasserting his ineffective-assistance claim and seeking investigative and/or expert assistance. After extensive litigation regarding whether House's claims were procedurally defaulted the Tennessee Supreme Court held that House's claims were barred under a state statute providing that claims not raised in prior postconviction proceedings are presumptively waived, Tenn. Code Ann. § 40–30–112 (1990) (repealed 1995), and that courts may not consider grounds for relief "which the court finds should be excluded because they have been waived or previously determined," § 40–30–111 (repealed 1995). See *House* v. *State*, 911 S. W. 2d 705 (1995). This Court denied certiorari. *House* v. *Tennessee*, 517 U. S. 1193 (1996).

House next sought federal habeas relief, asserting numerous claims of ineffective assistance of counsel and prosecutorial misconduct. The United States District Court for the Eastern District of Tennessee, though deeming House's claims procedurally defaulted and granting summary judgment to the State on the majority of House's claims, held an evidentiary hearing to determine whether House fell within the "actual innocence" exception to procedural default that this Court recognized as to substantive offenses in *Schlup* and as to death sentences in *Sawyer* v. *Whitley*, 505 U. S. 333 (1992). Presenting evidence we describe in greater detail below, House attacked the semen and blood evidence used at his trial and presented other evidence, including a putative confession, suggesting that Mr. Muncey, not House, committed the murder. The District Court nevertheless denied relief, holding that House had neither demonstrated actual innocence of the murder under *Schlup* nor established that he was ineligible for the death penalty under *Sawyer.*

The Court of Appeals for the Sixth Circuit granted a certificate of appealability under 28 U. S. C. § 2253(c) as to all claims in the habeas petition. On the merits a divided panel affirmed, but its opinion was withdrawn and the case taken en banc. A divided en banc court certified state-law questions to the Tennessee Supreme Court. *House* v. *Bell,* 311 F. 3d 767 (CA6 2002). Concluding that House had made a compelling showing of actual innocence, and recognizing that in *Herrera* v. *Collins,* 506 U. S. 390 (1993), this Court assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim," *id.,* at 417, the six-judge majority certified questions to the State Supreme Court, 311 F. 3d, at 777–778. The questions sought "to ascertain whether there remains a 'state avenue open to process such a claim' in this case." *Id.,* at 768. Four dissenting judges argued the court should have reached the merits, rather than certifying questions to the state court; these judges asserted that House could not obtain relief under *Schlup,* let alone *Sawyer* and *Herrera.* 311 F. 3d, at 780–781 (opinion of Boggs, J.). A fifth dissenter explained that while he agreed with the majority that House "presents a strong claim for habeas relief, at least at the sentencing phase of the case," he objected to the certification of questions to the Tennessee high court. *Id.,* at 787 (opinion of Gilman, J.). This Court denied certiorari. *Bell* v. *House,* 539 U. S. 937 (2003).

The State urged the Tennessee Supreme Court not to answer the Court of Appeals' certified questions, and the state court did not do so. The case returned to the United States Court of Appeals for the Sixth Circuit. This time an eight-judge majority affirmed the District Court's denial of habeas relief. 386 F. 3d 668 (2004). Six dissenters argued that House not only had met the actual-innocence standard for overcoming procedural default but also was entitled to immediate release under *Herrera.* 386 F. 3d, at 708 (opinion of Merritt, J.). A seventh dissenter (the same judge who wrote separately in the previous en banc decision) described the case as "a real-life murder mystery, an authentic 'who-done-it' where the wrong man may be executed." *Id.,* at 709 (opinion of Gilman, J.). He concluded such grave uncertainty necessitated relief in the form of a new trial for House. *Id.,* at 710.

We granted certiorari, 545 U. S. 1151 (2005), and now reverse.

## IV

As a general rule, claims forfeited under state law may support federal habeas relief only if the prisoner demonstrates cause for the default and prejudice from the asserted error. See *Murray* v. *Carrier,* 477 U. S. 478, 485 (1986); *Engle* v. *Isaac,* 456 U. S. 107, 129 (1982); *Wainwright* v. *Sykes,* 433 U. S. 72, 87 (1977). The rule is based on the comity and respect that must be accorded to state-court judgments. See, *e. g., Engle, supra,* at 126–129; *Wainwright, supra,* at 89–90. The bar is not, however, unqualified. In an effort to "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case," *Schlup,* 513 U. S., at 324, the Court has recognized a miscarriage-of-justice exception. "'[I]n appropriate cases,'" the Court has said, "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration,'" *Carrier, supra,* at 495 (quoting *Engle, supra,* at 135).

In *Schlup,* the Court adopted a specific rule to implement this general principle. It held that prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." 513 U. S., at 327. This formulation, *Schlup* explains, "ensures that petitioner's case is truly 'extraordinary,' while still providing petitioner a meaningful avenue by which to avoid a manifest injustice." *Ibid.* (quoting *McCleskey* v. *Zant,* 499 U. S. 467, 494 (1991)). In the usual case the presumed guilt of a prisoner convicted in state court counsels against federal review of defaulted claims. Yet a petition supported by a convincing *Schlup* gateway showing "raise[s] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error"; hence, "a review of the merits of the constitutional claims" is justified. 513 U. S., at 317.

For purposes of this case several features of the *Schlup* standard bear emphasis. First, although "[t]o be credible" a gateway claim requires "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial," *id.*, at 324, the habeas court's analysis is not limited to such evidence. There is no dispute in this case that House has presented some new reliable evidence; the State has conceded as much, see *infra,* at 540–541. In addition, because the District Court held an evidentiary hearing in this case, and because the State does not challenge the court's decision to do so, we have no occasion to elaborate on *Schlup*'s observation that when considering an actual-innocence claim in the context of a request for an evidentiary hearing, the District Court need not "test the new evidence by a standard appropriate for deciding a motion for summary judgment," but rather may "consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence." 513 U. S., at 331–332. Our review in this case addresses the merits of the *Schlup* inquiry, based on a fully developed record, and with respect to that inquiry *Schlup* makes plain that the habeas court must consider " 'all the evidence,' " old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under "rules of admissibility that would govern at trial." See *id.*, at 327–328 (quoting Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970)). Based on this total record, the court must make "a probabilistic determination about what reasonable, properly instructed jurors would do." 513 U. S., at 329. The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors. *Ibid.*

Second, it bears repeating that the *Schlup* standard is demanding and permits review only in the " 'extraordinary' " case. *Id.*, at 327 (quoting *Zant, supra,* at 494); see also 513 U. S., at 324 (emphasizing that "in the vast majority of cases, claims of actual innocence are rarely successful"). At the same time, though, the *Schlup* standard does not require absolute certainty about the petitioner's guilt or innocence. A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt.

Finally, as the *Schlup* decision explains, the gateway actual-innocence standard is "by no means equivalent to the standard of *Jackson* v. *Virginia,* 443 U. S. 307 (1979)," which governs claims of insufficient evidence. *Id.*, at 330. When confronted with a challenge based on trial evidence, courts presume the jury resolved evidentiary disputes reasonably so long as sufficient evidence supports the verdict. Because a *Schlup* claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record. See *ibid.* If new evidence so requires, this may include consideration of "the credibility of the witnesses presented at trial." *Ibid.;* see also *ibid.* (noting that "[i]n such a case, the habeas court may have to make some credibility assessments").

As an initial matter, the State argues that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, has replaced the *Schlup* standard with a stricter test based on *Sawyer*, which permits consideration of successive, abusive, or defaulted sentencing-related claims only if the petitioner "show[s] by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law," 505 U. S., at 336. One AEDPA provision establishes a similar standard for second or successive petitions involving no retroactively applicable new law, 28 U. S. C. §2244(b)(2)(B)(ii); another sets it as a threshold for obtaining an evidentiary hearing on claims the petitioner failed to develop in state court, §2254(e)(2). Neither provision addresses the type of petition at issue here—a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence. Thus, the standard of review in these provisions is inapplicable. Cf. *Lonchar* v. *Thomas*, 517 U. S. 314, 324 (1996) ("Dismissal of a *first* federal habeas petition is a particularly serious matter").

The State also argues that the District Court's findings in this case tie our hands, precluding a ruling in House's favor absent a showing of clear error as to the District Court's specific determinations. This view overstates the effect of the District Court's ruling. Deference is given to a trial court's assessment of evidence presented to it in the first instance. Yet the *Schlup* inquiry, we repeat, requires a holistic judgment about "'all the evidence,'" 513 U. S., at 328 (quoting Friendly, *supra*, at 160), and its likely effect on reasonable jurors applying the reasonable-doubt standard. As a general rule, the inquiry does not turn on discrete findings regarding disputed points of fact, and "[i]t is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses," 513 U. S., at 329. Here, although the District Court attentively managed complex proceedings, carefully reviewed the extensive record, and drew certain conclusions about the evidence, the court did not clearly apply *Schlup*'s predictive standard regarding whether reasonable jurors would have reasonable doubt. As we shall explain, moreover, we are uncertain about the basis for some of the District Court's conclusions—a consideration that weakens our reliance on its determinations.

With this background in mind we turn to the evidence developed in House's federal habeas proceedings.

### *DNA Evidence*

First, in direct contradiction of evidence presented at trial, DNA testing has established that the semen on Mrs. Muncey's nightgown and panties came from her husband, Mr. Muncey, not from House. The State, though conceding this point, insists this new evidence is immaterial. At the guilt phase at least, neither sexual contact nor motive were elements of the offense, so in the State's view the evidence, or lack of evidence, of sexual assault or sexual advance is of no consequence. We disagree. In fact we consider the new disclosure of central importance.

From beginning to end the case is about who committed the crime. When identity is in question, motive is key. The point, indeed, was not lost on the prosecution, for it introduced the evidence and relied on it in the final guilt-phase closing argument. Referring to "evidence at the scene," the prosecutor suggested that House committed, or attempted to commit, some "indignity" on Mrs. Muncey that neither she "nor any mother on that road would want to do with Mr. House." 9 Tr. 1302–1303. Particularly in a case like this where the proof was, as the State Supreme Court observed, circumstantial, *State* v. *House*, 743 S. W. 2d, at 143, 144, we think a jury would have given this evidence great weight. Quite apart from providing proof of motive, it was the only forensic evidence at the scene that would link House to the murder.

Law and society, as they ought to do, demand accountability when a sexual offense has been committed, so not only did this evidence link House to the crime; it likely was a factor in persuading the jury not to let him go free. At sentencing, moreover, the jury came to the unanimous conclusion, beyond a reasonable doubt, that the murder was committed in the course of a rape or kidnaping. The alleged sexual motivation relates to both those determinations. This is particularly so given that, at the sentencing phase, the jury was advised that House had a previous conviction for sexual assault.

A jury informed that fluids on Mrs. Muncey's garments could have come from House might have found that House trekked the nearly two miles to the victim's home and lured her away in order to commit a sexual offense. By contrast a jury acting without the assumption that the semen could have come from House would have found it necessary to establish some different motive, or, if the same motive, an intent far more speculative. When the only direct evidence of sexual assault drops out of the case, so, too, does a central theme in the State's narrative linking House to the crime. In that light, furthermore, House's odd evening walk and his false statements to authorities, while still potentially incriminating, might appear less suspicious.

### *Bloodstains*

The other relevant forensic evidence is the blood on House's pants, which appears in small, even minute, stains in scattered places. As the prosecutor told the jury, they were stains that, due to their small size, "you or I might not detect[,] [m]ight not see, but which the FBI lab was able to find on [House's] jeans." App. 11. The stains appear inside the right pocket, outside that pocket, near the inside button, on the left thigh and outside leg, on the seat of the pants, and on the right bottom cuff, including inside the pants. Due to testing by the FBI, cuttings now appear on the pants in several places where stains evidently were found. (The cuttings were destroyed in the testing process, and defense experts were unable to replicate the tests.) At trial, the government argued "nothing that the defense has introduced in this case explains what blood is doing on his jeans, all over [House's] jeans, that is scientifically, completely different from his blood." *Id.*, at 105. House, though not disputing at this point that the blood is Mrs. Muncey's, now presents an alternative explanation that, if credited, would undermine the probative value of the blood evidence.

During House's habeas proceedings, Dr. Cleland Blake, an Assistant Chief Medical Examiner for the State of Tennessee and a consultant in forensic pathology to the TBI for 22 years, testified that the blood on House's pants was chemically too degraded, and too similar to blood collected during the autopsy, to have come from Mrs. Muncey's body on the night of the crime. The blood samples collected during the autopsy were placed in test tubes without preservative. Under such conditions, according to Dr. Blake, "you will have enzyme degradation. You will have different blood group degradation, blood marker degradation." Record, Doc. 275, p. 80 (hereinafter R275:80). The problem of decay, moreover, would have been compounded by the body's long exposure to the elements, sitting outside for the better part of a summer day. In contrast, if blood is preserved on cloth, "it will stay there for years," *ibid.;* indeed, Dr. Blake said he deliberately places blood drops on gauze during autopsies to preserve it for later testing. The blood on House's pants, judging by Agent Bigbee's tests, showed "similar deterioration, breakdown of certain of the named numbered enzymes" as in the autopsy samples. *Id.*, at 110. "[I]f the victim's blood had spilled on the jeans while the victim was alive and this blood had dried," Dr. Blake stated, "the deterioration would not have occurred," *ibid.*, and "you would expect [the blood on the jeans] to be different than what was in the tube," *id.*, at 113. Dr. Blake thus concluded the blood on the jeans came from the autopsy samples, not from Mrs. Muncey's live (or recently killed) body.

Other evidence confirms that blood did in fact spill from the vials. It appears the vials passed from Dr. Carabia, who performed the autopsy, into the hands of two local law enforcement officers, who transported it to the FBI, where Agent Bigbee performed the enzyme tests. The blood was contained in four vials, evidently with neither preservative nor a proper seal. The vials, in turn, were stored in a styrofoam box, but nothing indicates the box was kept cool. Rather, in what an evidence protocol expert at the habeas hearing described as a violation of proper procedure, the styrofoam box was packed in the same cardboard box as other evidence including House's pants (apparently in a paper bag) and other clothing (in separate bags). The cardboard box was then carried in the officers' car while they made the 10-hour journey from Tennessee to the FBI lab. Dr. Blake stated that blood vials in hot conditions (such as a car trunk in the summer) could blow open; and in fact, by the time the blood reached the FBI it had hemolyzed, or spoiled, due to heat exposure. By the time the blood passed from the FBI to a defense expert, roughly a vial and a half were empty, though Agent Bigbee testified he used at most a quarter of one vial. Blood, moreover, had seeped onto one corner of the styrofoam box and onto packing gauze inside the box below the vials.

In addition, although the pants apparently were packaged initially in a paper bag and FBI records suggest they arrived at the FBI in one, the record does not contain the paper bag but does contain a plastic bag with a label listing the pants and Agent Scott's name—and the plastic bag has blood on it. The blood appears in a forked streak roughly five inches long and two inches wide running down the bag's outside front. Though testing by House's expert confirmed the stain was blood, the expert could not determine the blood's source. Speculations about when and how the blood got there add to the confusion regarding the origins of the stains on House's pants.

Faced with these indications of, at best, poor evidence control, the State attempted to establish at the habeas hearing that all blood spillage occurred after Agent Bigbee examined the pants. Were that the case, of course, then blood would have been detected on the pants before any spill—which would tend to undermine Dr. Blake's analysis and support using the bloodstains to infer House's guilt. In support of this theory the State put on testimony by a blood spatter expert who believed the "majority" of the stains were "transfer stains," that is, stains resulting from "wip[ing] across the surface of the pants" rather than seeping or spillage. App. 293–294. Regarding the spillage in the styrofoam box, the expert noted that yellow "Tennessee Crime Laboratory" tape running around the box and down all four sides did not line up when the bloodstains on the box's corner were aligned. The inference was that the FBI received the box from Tennessee authorities, opened it, and resealed it before the spillage occurred. Reinforcing this theory, Agent Bigbee testified that he observed no blood spillage in the styrofoam box and that had he detected such signs of evidence contamination, FBI policy would have required immediate return of the evidence.

In response House argued that even assuming the tape alignment showed spillage occurring after FBI testing, spillage on one or more earlier occasions was likely. In fact even the State's spatter expert declined to suggest the blood in the box and on the packing gauze accounted for the full vial and a quarter missing. And when the defense expert opened the box and discovered the spills, the bulk of the blood-caked gauze was located around and underneath the half-full vial, which was also located near the stained corner. No gauze immediately surrounding the completely empty vial was stained. The tape, moreover, circled the box in two layers, one underneath the other, and in one spot the underlying layer stops cleanly at the lid's edge, as if cut with a razor, and does not continue onto the body of the box below. In House's view this clean cut suggests the double layers could not have resulted simply from wrapping the tape around twice, as the spatter expert claimed; rather, someone possessing Tennessee Crime Lab tape—perhaps the officers transporting the blood and pants—must have cut the box open and resealed it, possibly creating an opportunity for spillage. Supporting the same inference, a label on the box's lid lists both blood and vaginal secretions as the box's contents, though Agent Bigbee's records show the vaginal fluids arrived at the FBI in a separate envelope. Finally, cross-examination revealed that Agent Bigbee's practice did not always match the letter of FBI policy. Although Mrs. Muncey's bra and housecoat were packed together in a single bag, creating, according to Agent Bigbee, a risk of "cross contamination," *id.*, at 286, he did not return them; nor did he note the discrepancy between the "[b]lood and vaginal secretions" label and the styrofoam box's actual contents, though he insisted his customary practice was to match labels with contents immediately upon opening an evidence box, *id.*, at 287.

The State challenged Dr. Blake's scientific conclusions, and to do so it called Agent Bigbee as a witness. Agent Bigbee defended the testimony he had given at the trial. To begin with, he suggested Dr. Blake had misconstrued the term "inc" in Agent Bigbee's trial report, interpreting it to mean "incomplete" when it in fact meant "inconclusive." *Id.*, at 254–256, 282. Dr. Blake, however, replied "[s]ame difference" when asked whether his opinion would change if "inc" meant "inconclusive." *Id.*, at 256; see also 6 Tr. 906 (Bigbee trial testimony) ("You will notice I have INC written under the transparent, that is the symbol that I use to mean the test was incomplete"). Agent Bigbee further asserted that, whereas Dr. Blake (in Bigbee's view) construed the results to mean the enzyme was not present at all, in fact the results indicated only that Bigbee could not identify the marker type on whatever enzymes were present. App. 282. Yet the State did not cross-examine Dr. Blake on this point, nor did the District Court resolve the dispute one way or the other, so on this record it seems possible that Dr. Blake meant only to suggest the blood was too degraded to permit conclusive typing. The State, moreover, does not ask us to question Dr. Blake's basic premise about the durability of blood chemicals deposited on cotton—a premise Agent Bigbee appeared to accept as a general matter. Given the record as it stands, then, we cannot say Dr. Blake's conclusions have been discredited; if other objections might be adduced, they must await further proceedings. At the least, the record before us contains credible testimony suggesting that the missing enzyme markers are generally better preserved on cloth than in poorly kept test tubes, and that principle could support House's spillage theory for the blood's origin.

In this Court, as a further attack on House's showing, the State suggests that, given the spatter expert's testimony, House's theory would require a jury to surmise that Tennessee officials donned the pants and deliberately spread blood over them. We disagree. This should be a matter for the trier of fact to consider in the first instance, but we can note a line of argument that could refute the State's position. It is correct that the State's spatter expert opined that the stains resulted from wiping or smearing rather than direct spillage; and she further stated that the distribution of stains in some spots suggests the pants were "folded in some manner or creased in some manner" when the transfers occurred, *id.*, at 296. While the expert described this pattern, at least with respect to stains on the lap of the pants, as "consistent" with the pants being worn at the time of the staining, *ibid.*, her testimony, as we understand it, does not refute the hypothesis that the packaging of the pants for transport was what caused them to be folded or creased. It seems permissible, moreover, to conclude that the small size and wide distribution of stains—inside the right pocket, outside that pocket, near the inside button, on the left thigh and outside leg, on the seat of the pants, and on the right bottom cuff, including inside the pants—fits as well with spillage in transport as with wiping and smearing from bloody objects at the crime scene, as the State proposes. (As has been noted, no blood was found on House's shoes.)

The District Court discounted Dr. Blake's opinion, not on account of Blake's substantive approach, but based on testimony from Agent Scott indicating he saw, as the District Court put it, "what appeared to be bloodstains on Mr. House's blue jeans when the jeans were removed from the laundry hamper at Ms. Turner's trailer." *Id.*, at 348. This inference seems at least open to question, however. Agent Scott stated only that he "saw reddish brownish stains [he] suspected to be blood"; he admitted that he "didn't thoroughly examine the blue jeans at that time." R276:113–114. The pants were in fact extensively soiled with mud and reddish stains, only small portions of which are blood.

In sum, considering "'all the evidence,'" *Schlup*, 513 U. S., at 328 (quoting Friendly, 38 U. Chi. L. Rev., at 160), on this issue, we think the evidentiary disarray surrounding the blood, taken together with Dr. Blake's testimony and the limited rebuttal of it in the present record, would prevent reasonable jurors from placing significant reliance on the blood evidence. We now know, though the trial jury did not, that an Assistant Chief Medical Examiner believes the blood on House's jeans must have come from autopsy samples; that a vial and a quarter of autopsy blood is unaccounted for; that the blood was transported to the FBI together with the pants in conditions that could have caused vials to spill; that the blood did indeed spill at least once during its journey from Tennessee authorities through FBI hands to a defense expert; that the pants were stored in a plastic bag bearing both a large blood stain and a label with TBI Agent Scott's name; and that the styrofoam box containing the blood samples may well have been opened before it arrived at the FBI lab. Thus, whereas the bloodstains, emphasized by the prosecution, seemed strong evidence of House's guilt at trial, the record now raises substantial questions about the blood's origin.

### *A Different Suspect*

Were House's challenge to the State's case limited to the questions he has raised about the blood and semen, the other evidence favoring the prosecution might well suffice to bar relief. There is, however, more; for in the post-trial proceedings House presented troubling evidence that Mr. Muncey, the victim's husband, himself could have been the murderer.

At trial, as has been noted, the jury heard that roughly two weeks before the murder Mrs. Muncey's brother received a frightened phone call from his sister indicating that she and Mr. Muncey had been fighting, that she was scared, and that she wanted to leave him. The jury also learned that the brother once saw Mr. Muncey "smac[k]" the victim. 7 Tr. 1087–1088. House now has produced evidence from multiple sources suggesting that Mr. Muncey regularly abused his wife. For example, one witness—Kathy Parker, a lifelong area resident who denied any animosity toward Mr. Muncey—recalled that Mrs. Muncey "was constantly with black eyes and busted mouth." App. 235. In addition Hazel Miller, who is Kathy Parker's mother and a lifelong acquaintance of Mr. Muncey, testified at the habeas hearing that two or three months before the victim's death Mr. Muncey came to Miller's home and "tried to get my daughter [Parker] to go out with him," R274:47. (Parker had dated Mr. Muncey at age 14.) According to Miller, Muncey said "[h]e was upset with his wife, that they had had an argument and he said he was going to get rid of that woman one way or the other." App. 236.

Another witness—Mary Atkins, also an area native who "grew up" with Mr. Muncey and professed no hard feelings, R274:10, 16—claims she saw Mr. Muncey "backhan[d]" Mrs. Muncey on the very night of the murder. App. 226, 228. Atkins recalled that during a break in the recreation center dance, she saw Mr. Muncey and his wife arguing in the parking lot. Mr. Muncey "grabbed her and he just backhanded her." *Id.*, at 228. After that, Mrs. Muncey "left walking." *Id.*, at 229. There was also testimony from Atkins' mother, named Artie Lawson. A self-described "good friend" of Mr. Muncey, *id.*, at 231, Lawson said Mr. Muncey visited her the morning after the murder, before the body was found. According to Lawson, Mr. Muncey asked her to tell anyone who inquired not only that she had been at the dance the evening before and had seen him, but also that he had breakfasted at her home at 6 o'clock that morning. Lawson had not in fact been at the dance, nor had Mr. Muncey been with her so early.

Of most importance is the testimony of Kathy Parker and her sister Penny Letner. They testified at the habeas hearing that, around the time of House's trial, Mr. Muncey had confessed to the crime. Parker recalled that she and "some family members and some friends [were] sitting around drinking" at Parker's trailer when Mr. Muncey "just walked in and sit down." R274:37. Muncey, who had evidently been drinking heavily, began "rambling off . . . [t]alking about what happened to his wife and how it happened and he didn't mean to do it." *Ibid.* According to Parker, Mr. Muncey "said they had been into [an] argument and he slapped her and she fell and hit her head and it killed her and he didn't mean for it to happen." *Id.*, at 38. Parker said she "freaked out and run him off." *Ibid.*

Letner similarly recalled that at some point either "during [House's] trial or just before," *id.*, at 30, Mr. Muncey intruded on a gathering at Parker's home. Appearing "pretty well blistered," Muncey "went to crying and was talking about his wife and her death and he was saying that he didn't mean to do it." App. 232. "[D]idn't mean to do what[?]," Letner asked, R274:33, at which point Mr. Muncey explained:

> "[S]he was 'bitching him out' because he didn't take her fishing that night, that he went to the dance instead. He said when he come home that she was still on him pretty heavily 'bitching him out' again and that he smacked her and that she fell and hit her head. He said I didn't mean to do it, but I had to get rid of her, because I didn't want to be charged with murder." App. 232–233.

Letner, who was then 19 years old with a small child, said Mr. Muncey's statement "scared [her] quite badly," so she "got out of there immediately." *Id.*, at 233. Asked whether she reported the incident to the authorities, Letner stated, "I was frightened, you know. . . . I figured me being 19 year old they wouldn't listen to anything I had to say." R274:31. Parker, on the other hand, claimed she (Parker) in fact went to the Sheriff's Department, but no one would listen:

> "I tried to speak to the Sheriff but he was real busy. He sent me to a deputy. The deputy told me to go upstairs to the courtroom and talk to this guy, I can't remember his name. I never did really get to talk to anybody." App. 234.

Parker said she did not discuss the matter further because "[t]hey had it all signed, sealed and delivered. We didn't know anything to do until we heard that they reopened [House's] trial." R274:45. Parker's mother, Hazel Miller, confirmed she had driven Parker to the courthouse, where Parker "went to talk to some of the people about this case." App. 237.

Other testimony suggests Mr. Muncey had the opportunity to commit the crime. According to Dennis Wallace, a local law enforcement official who provided security at the dance on the night of the murder, Mr. Muncey left the dance "around 10:00, 10:30, 9:30 to 10:30." R274:56–57. Although Mr. Muncey told law enforcement officials just after the murder that he left the dance only briefly and returned, Wallace could not recall seeing him back there again. Later that evening, Wallace responded to Mr. Muncey's report that his wife was missing. Muncey denied he and his wife had been "a fussing or a fighting"; he claimed his wife had been "kidnapped." *Id.*, at 58. Wallace did not recall seeing any blood, disarray, or knocked-over furniture, although he admitted he "didn't pay too much attention" to whether the floor appeared especially clean. According to Wallace, Mr. Muncey said "let's search for her" and then led Wallace out to search "in the weeds" around the home and the driveway (not out on the road where the body was found). *Id.*, at 58, 60, 63.

In the habeas proceedings, then, two different witnesses (Parker and Letner) described a confession by Mr. Muncey; two more (Atkins and Lawson) described suspicious behavior (a fight and an attempt to construct a false alibi) around the time of the crime; and still other witnesses described a history of abuse.

As to Parker and Letner, the District Court noted that it was "not impressed with the allegations of individuals who wait over ten years to come forward with their evidence," especially considering that "there was no physical evidence in the Munceys' kitchen to corroborate [Mr. Muncey's] alleged confession that he killed [his wife] there." App. 348. Parker and Letner, however, did attempt to explain their delay coming forward, and the record indicates no reason why these two women, both lifelong acquaintances of Mr. Muncey, would have wanted either to frame him or to help House. Furthermore, the record includes at least some independent support for the statements Parker and Letner attributed to Mr. Muncey. The supposed explanation for the fatal fight—that his wife was complaining about going fishing—fits with Mrs. Muncey's statement to Luttrell earlier that evening that her husband's absence was "all right, because she was going to make him take her fishing the next day," *id.*, at 11–12. And Dr. Blake testified, in only partial contradiction of Dr. Carabia, that Mrs. Muncey's head injury resulted from "a surface with an edge" or "a hard surface with a corner," not from a fist. R275:72. (Dr. Carabia had said either a fist or some other object could have been the cause.)

Mr. Muncey testified at the habeas hearing, and the District Court did not question his credibility. Though Mr. Muncey said he seemed to remember visiting Lawson the day after the murder, he denied either killing his wife or confessing to doing so. Yet Mr. Muncey also claimed, contrary to Constable Wallace's testimony and to his own prior statement, that he left the dance on the night of the crime only when it ended at midnight. Mr. Muncey, moreover, denied ever hitting Mrs. Muncey; the State itself had to impeach him with a prior statement on this point.

It bears emphasis, finally, that Parker's and Letner's testimony is not comparable to the sort of eleventh-hour affidavit vouching for a defendant and incriminating a conveniently absent suspect that Justice O'Connor described in her concurring opinion in *Herrera* as "unfortunate" and "not uncommon" in capital cases, 506 U. S., at 423; nor was the confession Parker and Letner described induced under pressure of interrogation. The confession evidence here involves an alleged spontaneous statement recounted by two eyewitnesses with no evident motive to lie. For this reason it has more probative value than, for example, incriminating testimony from inmates, suspects, or friends or relations of the accused.

The evidence pointing to Mr. Muncey is by no means conclusive. If considered in isolation, a reasonable jury might well disregard it. In combination, however, with the challenges to the blood evidence and the lack of motive with respect to House, the evidence pointing to Mr. Muncey likely would reinforce other doubts as to House's guilt.

### *Other Evidence*

Certain other details were presented at the habeas hearing. First, Dr. Blake, in addition to testifying about the blood evidence and the victim's head injury, examined photographs of House's bruises and scratches and concluded, based on 35 years' experience monitoring the development and healing of bruises, that they were too old to have resulted from the crime. In addition Dr. Blake claimed that the injury on House's right knuckle was indicative of "[g]etting mashed"; it was not consistent with striking someone. R275:63. (That of course would also eliminate the explanation that the injury came from the blow House supposedly told Turner he gave to his unidentified assailant.)

The victim's daughter, Lora Muncey (now Lora Tharp), also testified at the habeas hearing. She repeated her recollection of hearing a man with a deep voice like her grandfather's and a statement that her father had had a wreck down by the creek. She also denied seeing any signs of struggle or hearing a fight between her parents, though she also said she could not recall her parents ever fighting physically. The District Court found her credible, and this testimony certainly cuts in favor of the State.

Finally, House himself testified at the habeas proceedings. He essentially repeated the story he allegedly told Turner about getting attacked on the road. The District Court found, however, based on House's demeanor, that he "was not a credible witness." App. 329.

### *Conclusion*

This is not a case of conclusive exoneration. Some aspects of the State's evidence—Lora Muncey's memory of a deep voice, House's bizarre evening walk, his lie to law enforcement, his appearance near the body, and the blood on his pants—still support an inference of guilt. Yet the central forensic proof connecting House to the crime—the blood and the semen—has been called into question, and House has put forward substantial evidence pointing to a different suspect. Accordingly, and although the issue is close, we conclude that this is the rare case where—had the jury heard all the conflicting testimony—it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt.

## V

In addition to his gateway claim under *Schlup,* House argues that he has shown freestanding innocence and that as a result his imprisonment and planned execution are unconstitutional. In *Herrera,* decided three years before *Schlup,* the Court assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." 506 U. S., at 417; see also *id.,* at 419 (O'Connor, J., concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution"). "[T]he threshold showing for such an assumed right would necessarily be extraordinarily high," the Court explained, and petitioner's evidence there fell "far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo,* to exist." *Id.,* at 417, 418–419; see also *id.,* at 427 (O'Connor, J., concurring) (noting that because "[p]etitioner has failed to make a persuasive showing of actual innocence," "the Court has no reason to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence"). House urges the Court to answer the question left open in *Herrera* and hold not only that freestanding innocence claims are possible but also that he has established one.

We decline to resolve this issue. We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it. To be sure, House has cast considerable doubt on his guilt—doubt sufficient to satisfy *Schlup*'s gateway standard for obtaining federal review despite a state procedural default. In *Herrera*, however, the Court described the threshold for any hypothetical freestanding innocence claim as "extraordinarily high." 506 U. S., at 417. The sequence of the Court's decisions in *Herrera* and *Schlup*—first leaving unresolved the status of freestanding claims and then establishing the gateway standard—implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup*. It follows, given the closeness of the *Schlup* question here, that House's showing falls short of the threshold implied in *Herrera*.

* * *

House has satisfied the gateway standard set forth in *Schlup* and may proceed on remand with procedurally defaulted constitutional claims. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE ALITO took no part in the consideration or decision of this case.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring in the judgment in part and dissenting in part.

To overcome the procedural hurdle that Paul House created by failing to properly present his constitutional claims to a Tennessee court, he must demonstrate that the constitutional violations he alleges "ha[ve] probably resulted in the conviction of one who is actually innocent," such that a federal court's refusal to hear the defaulted claims would be a "miscarriage of justice." *Schlup* v. *Delo*, 513 U. S. 298, 326, 327 (1995) (internal quotation marks omitted). To make the requisite showing of actual innocence, House must produce "new *reliable* evidence" and "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.*, at 324, 327 (emphasis added). The question is not whether House was prejudiced at his trial because the jurors were not aware of the new evidence, but whether all the evidence, considered together, proves that House was actually innocent, so that no reasonable juror would vote to convict him. Considering all the evidence, and giving due regard to the District Court's findings on whether House's new evidence was reliable, I do not find it probable that no reasonable juror would vote to convict him, and accordingly I dissent.

Because I do not think that House has satisfied the actual innocence standard set forth in *Schlup*, I do not believe that he has met the higher threshold for a freestanding innocence claim, assuming such a claim exists. See *Herrera* v. *Collins*, 506 U. S. 390, 417 (1993). I therefore concur in the judgment with respect to the Court's disposition of that separate claim.

## I

In *Schlup*, we stated that a habeas petitioner attempting to present a defaulted claim to a federal court must present "new *reliable* evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." 513 U. S., at 324 (emphasis added). Implicit in the requirement that a habeas petitioner present reliable evidence is the expectation that a factfinder will assess reliability. The new evidence at issue in *Schlup* had not been subjected to such an assessment—the claim in *Schlup* was for an evidentiary hearing—

and this Court specifically recognized that the "new statements may, of course, be unreliable." *Id.*, at 331. The Court stated that the District Court, as the "reviewing tribunal," was tasked with assessing the "probative force" of the petitioner's new evidence of innocence, and "may have to make some credibility assessments." *Id.*, at 327–328, 330. Indeed, the Supreme Court took the unusual step of remanding the case to the Court of Appeals "with instructions to remand to the District Court," so that the District Court could consider how the "likely credibility of the affiants" bears upon the "probable reliability" of the new evidence. *Id.*, at 332. In short, the new evidence is not simply taken at face value; its reliability has to be tested.

Critical to the Court's conclusion here that House has sufficiently demonstrated his innocence are three pieces of new evidence presented to the District Court: DNA evidence showing that the semen on Carolyn Muncey's clothing was from her husband, Hubert Muncey, not from House; testimony from new witnesses implicating Mr. Muncey in the murder; and evidence indicating that Mrs. Muncey's blood spilled from test tubes containing autopsy samples in an evidence container. To determine whether it should open its door to House's defaulted constitutional claims, the District Court considered this evidence in a comprehensive evidentiary hearing. As House presented his new evidence, and as the State rebutted it, the District Court observed the witnesses' demeanor, examined physical evidence, and made findings about whether House's new evidence was in fact reliable. This factfinding role is familiar to a district court. "The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Anderson* v. *Bessemer City*, 470 U. S. 564, 574 (1985).

The State did not contest House's new DNA evidence excluding him as the source of the semen on Mrs. Muncey's clothing, but it strongly contested the new testimony implicating Mr. Muncey, and it insisted that the blood spillage occurred *after* the FBI tested House's jeans and determined that they were stained with Mrs. Muncey's blood.

At the evidentiary hearing, sisters Kathy Parker and Penny Letner testified that 14 years earlier, either during or around the time of House's trial, they heard Mr. Muncey drunkenly confess to having accidentally killed his wife when he struck her in their home during an argument, causing her to fall and hit her head. Record, Doc. 274, pp. 28–29, 30, 37–38. *Schlup* provided guidance on how a district court should assess this type of new evidence: The court "may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence," and it "must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." 513 U. S., at 332. Consistent with this guidance, the District Court concluded that the sisters' testimony was not credible. The court noted that it was "not impressed with the allegations of individuals who wait over ten years to come forward." App. 348. It also considered how the new testimony fit within the larger web of evidence, observing that Mr. Muncey's alleged confession contradicted the testimony of the Munceys' "very credible" daughter, Lora Tharp, who consistently testified that she did not hear a fight in the house that night, but instead heard a man with a deep voice who lured her mother from the house by saying that Mr. Muncey had been in a wreck near the creek. *Id.*, at 323, 348.

The District Court engaged in a similar reliability inquiry with regard to House's new evidence of blood spillage. At the evidentiary hearing, House conceded that FBI testing showed that his jeans were stained with Mrs. Muncey's blood, but he set out to prove that the blood spilled from test tubes containing autopsy samples, and that it did so before the jeans were tested by the FBI. The District Court summarized the testimony of the various witnesses who handled the evidence and their recollections about bloodstains and spillage; it acknowledged that House's expert, Dr. Cleland Blake, disagreed with FBI Agent Paul Bigbee about how to interpret the results of Agent Bigbee's genetic marker analysis summary; and it summarized the testimony of the State's blood spatter expert, Paulette Sutton. *Id.*, at 339–347. After reviewing all the evidence, the District Court stated: "Based upon the evidence introduced during the evidentiary hearing . . . the court concludes that the spillage occurred *after* the FBI crime laboratory received and tested the evidence." *Id.*, at 348 (emphasis added).

Normally, an appellate court reviews a district court's factual findings only for clear error. See Fed. Rule Civ. Proc. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses"); *Bessemer City, supra,* at 574 (clearly-erroneous standard applies "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts"). The Sixth Circuit deferred to the District Court's factual findings, 386 F. 3d 668, 684 (2004), and *Schlup* did not purport to alter—but instead reaffirmed and highlighted—the district court's critical role as factfinder. Yet the majority asserts that the clear error standard "overstates the effect of the District Court's ruling," and then dismisses the District Court's reliability findings because it is "uncertain about" them, while stopping short of identifying clear error. *Ante,* at 539–540. This is a sharp departure from the guidance in *Schlup.*

In *Schlup,* we contrasted a district court's role in assessing the reliability of new evidence of innocence with a district court's role in deciding a summary judgment motion. 513 U. S., at 332. We explained that, in the latter situation, the district court does not assess credibility or weigh the evidence, but simply determines whether there is a genuine factual issue for trial. *Ibid.* Assessing the reliability of new evidence, on the other hand, is a typical factfinding role, requiring credibility determinations and a weighing of the "probative force" of the new evidence in light of "the evidence of guilt adduced at trial." *Ibid.* We found it "[o]bviou[s]" that a habeas court conducting an actual innocence inquiry must do more than simply check whether there are genuine factual issues for trial. *Ibid.* The point of the actual innocence inquiry is for the federal habeas court to satisfy itself that it should suspend the normal procedural default rule, disregard the important judicial interests of finality and comity, and allow a state prisoner to present his defaulted constitutional claims to a federal court. See *McCleskey* v. *Zant,* 499 U. S. 467, 490–491 (1991).

The majority surprisingly states that this guidance is inapplicable here because this case involves a "fully developed record," while the District Court in *Schlup* had declined to conduct an evidentiary hearing. *Ante,* at 537–538. But the guidance is clearly applicable: The point in *Schlup* was not simply that a hearing was required, but why—because the District Court had to assess the probative force of the petitioner's newly presented evidence, by engaging in factfinding rather than performing a summary-judgment-type inquiry. 513 U. S., at 331–332. That is precisely what the District Court did here. In addition to a "fully developed record," we have the District Court's factual findings about the reliability of the new evidence in that record, factual findings which the majority disregards without finding clear error.

The majority essentially disregards the District Court's role in assessing the reliability of House's new evidence. With regard to the sisters' testimony, the majority casts aside the District Court's determination that their statements came too late and were too inconsistent with credible record evidence to be reliable, instead observing that the women had no obvious reason to lie, that a few aspects of their testimony have record support, and that they recounted an uncoerced confession. *Ante*, at 551–552. As for the District Court's express finding that the autopsy blood spilled after the FBI tested House's jeans, the majority points to Dr. Blake's testimony that blood enzymes "are generally better preserved on cloth," and even conjures up its own theory in an attempt to refute Ms. Sutton's expert testimony that the pattern of some bloodstains was consistent with blood being transferred while the pants were being worn. *Ante*, at 546–547 ("This should be a matter for the trier of fact to consider in the first instance, but we can note a line of argument that could refute the State's position. . . . [Ms. Sutton's] testimony . . . does not refute the hypothesis that the packaging of the pants for transport was what caused them to be folded or creased"); see App. 296.

The majority's assessment of House's new evidence is precisely the summary-judgment-type inquiry *Schlup* said was inappropriate. 513 U. S., at 332. By casting aside the District Court's factual determinations made after a comprehensive evidentiary hearing, the majority has done little more than reiterate the factual disputes presented below. Witnesses do not testify in our courtroom, and it is not our role to make credibility findings and construct theories of the possible ways in which Mrs. Muncey's blood could have been spattered and wiped on House's jeans. The District Court did not painstakingly conduct an evidentiary hearing to compile a record for us to sort through transcript by transcript and photograph by photograph, assessing for ourselves the reliability of what we see. *Schlup* made abundantly clear that reliability determinations were essential, but were for the district court to make. *Id.*, at 331–332. We are to defer to the better situated District Court on reliability, unless we determine that its findings are clearly erroneous. We are not concerned with "the district court's independent judgment as to whether reasonable doubt exists," *id.*, at 329, but the District Court here made basic factual findings about the reliability of House's new evidence; it did not offer its personal opinion about whether it doubted House's guilt. *Schlup* makes clear that those findings are controlling unless clearly erroneous.

I have found no clear error in the District Court's reliability findings. Not having observed Ms. Parker and Ms. Letner testify, I would defer to the District Court's determination that they are not credible, and the evidence in the record undermining the tale of an accidental killing during a fight in the Muncey home convinces me that this credibility finding is not clearly erroneous. Dr. Alex Carabia, who performed the autopsy, testified to injuries far more severe than a bump on the head: Mrs. Muncey had bruises on the front and back of her neck, on both thighs, on her lower right leg and left knee, and her hands were bloodstained up to the wrists; her injuries were consistent with a struggle and traumatic strangulation. Record, Addendum 4, 7 Tr. of Evidence in No. 378 (Crim. Ct. Union County, Tenn.), pp. 984–987 (hereinafter Tr.). And, of course, Lora Tharp has consistently recalled a deep-voiced visitor arriving late at night to tell Mrs. Muncey that her husband was in a wreck near the creek. App. 19, 270.

I also find abundant evidence in the record to support the District Court's finding that blood spilled within the evidence container after the FBI received and tested House's jeans. Agent Bigbee testified that there was no leakage in the items submitted to him for testing. *Id.*, at 277. The majority's entire analysis on this point assumes the agent flatly lied, though there was no attack on his credibility below. Moreover, Ms. Sutton determined, in her expert opinion, that the wide distribution of stains "front and back, top to bottom," the fact that some bloodstains were mixed with mud, and the presence of bloodstains inside the pocket and inside the fly, showed that the blood was spattered and wiped—not spilled—on House's jeans. *Id.*, at 291–293, 295; *id.*, at 293 ("[I]f a tube of blood had spilled on these pants, the stain should have been in a localized area"); *id.*, at 294 ("The stains also . . . either originate on the inside and don't soak out or on the outside and are not soaking to the inside. That, of course, would be what you would see with a spill").

It is also worth noting that the blood evidently spilled inside the evidence container when the jeans were protected inside a plastic zip lock bag, as shown by the presence of a bloodstain on the outside of that bag. See Record, Pl. Exh. 10–6. House's expert tested the exterior and interior of that plastic bag for bloodstains using an "extremely sensitive" test, and only the exterior of the bag tested positive for blood. *Id.*, Doc. 274, at 95–96. The evidence in the record indicates that the jeans were placed in the plastic bag *after* they arrived at the FBI: FBI records show that the jeans arrived there in a *paper* bag, and the plastic bag has FBI markings on it. *Id.*, Addendum 2, Trial Exh. 31, at 36; *id.*, Pl. Exh. 10–6. The bloodstain on the outside of the *plastic* bag therefore further supports the District Court's conclusion that the blood spilled *after* the evidence was received and tested by the FBI, and not en route when the jeans were in a paper bag. I suppose it is theoretically possible that the jeans were contaminated by spillage before arriving at the FBI, that Agent Bigbee either failed to note or lied about such spillage, and that the FBI then transferred the jeans into a plastic bag and put them back inside the evidence container with the spilled blood still sloshing around sufficiently to contaminate the outside of the plastic bag as extensively as it did. This sort of unbridled speculation can theoretically defeat any inconvenient fact, but does not suffice to convince me that the District Court's factual finding—that the blood spilled *after* FBI testing—was clearly erroneous.

Moreover, the yellow "Tennessee Crime Lab" tape placed around the container on all four sides does not line up when the bloodstained corners of the container and its lid are aligned, showing that the blood did not spill until sometime after the container was received and opened at its first destination—the FBI. See *id.*, Respondent's Exh. 24; *id.*, Doc. 276, at 190–191 (testimony of Paulette Sutton). The majority points out that on one side of the container, the first of two layers of tape appears to begin cleanly at the lid's edge, and from this concludes that the container must have been cut open and resealed by Tennessee authorities en route to the FBI. *Ante*, at 545; see Record, Respondent's Exh. 23d. Even if the majority's deduction from a photograph of the container were true, it would show only that Tennessee authorities had reason to open the container once it was sealed to take something out or put something in, perhaps back at the crime lab in Union County. But even if the container had been opened before its arrival at the FBI, the majority recognizes that it was resealed with "Tennessee Crime Lab" tape, and the second layer of tape aligns only when the bloodstains on the container and its lid do not. *Ante*, at 544. Of course, the District Court—which concluded that the blood was spilled *after* testing at the FBI laboratory—had before it the box itself with the tape as the witnesses testified on the point, and not—like this Court—simply a photograph. See *Bessemer City*, 470 U. S., at 574 (district court's findings about physical evidence are reviewed for clear error).

House's theory that the blood on his jeans was transferred there from the autopsy samples is based on Dr. Blake's reading of Agent Bigbee's enzyme marker analysis summary. After reading the summary, Dr. Blake concluded that the enzymes in the bloodstains on House's jeans and the enzymes in the autopsy samples had deteriorated to the same extent. Record, Doc. 275, at 110. In particular, he noted that the GLO1 enzyme showed "incomplete penetration" on both the autopsy blood and the jeans, and because enzymes are better preserved on cloth, the enzyme should have been present on the jeans. *Id.*, at 116. But Agent Bigbee disputed Dr. Blake's reading of what was, after all, Agent Bigbee's own study. He testified that "'inc'" on his chart meant "inconclusive," not "incomplete penetration," and that the term "inconclusive" meant that the enzyme was present, but could not be grouped into an ABO bloodtype. *Id.*, Doc. 276, at 140. While pointing out that his summary showed different levels of enzymes in the two samples, Agent Bigbee also noted that many different factors—such as heat, dirt, or bacteria in a clothes hamper—could cause enzymes to degrade on cloth. *Id.*, at 139, 167–170. Considering how House's new blood spillage evidence fits within the record as a whole, I can see no clear error in the District Court's express finding that the blood spilled in the evidence container *after* the FBI found Mrs. Muncey's blood on House's jeans.

The District Court attentively presided over a complex evidentiary hearing, often questioning witnesses extensively during the presentation of critical evidence. See, *e. g., id.*, Doc. 275, at 110–115. The court concisely summarized the evidence presented, then dutifully made findings about the reliability of the testimony it heard and the evidence it observed. We are poorly equipped to second-guess the District Court's reliability findings and should defer to them, consistent with the guidance we provided in *Schlup.*

## II

With due regard to the District Court's reliability findings, this case invites a straightforward application of the legal standard adopted in *Schlup.* A petitioner does not pass through the *Schlup* gateway if it is "more likely than not that there is *any* juror who, acting reasonably, would have found the petitioner guilty beyond a reasonable doubt." 513 U. S., at 333 (O'Connor, J., concurring) (emphasis added).

The majority states that if House had presented just one of his three key pieces of evidence—or even two of the three—he would not pass through the *Schlup* gateway. See *ante,* at 548 ("Were House's challenge to the State's case limited to the questions he has raised about the blood and semen, the other evidence favoring the prosecution might well suffice to bar relief"); *ante,* at 552–553 ("If considered in isolation, a reasonable jury might well disregard [the evidence pointing to Mr. Muncey]. In combination, however, with the challenges to the blood evidence and the lack of motive with respect to House, the evidence pointing to Mr. Muncey likely would reinforce other doubts as to House's guilt"). According to the majority, House has picked the trifecta of evidence that places conviction outside the realm of choices *any* juror, acting reasonably, would make. Because the case against House remains substantially unaltered from the case presented to the jury, I disagree.

At trial, the State presented its story about what happened on the night of Mrs. Muncey's murder. The Munceys' daughter heard a deep-voiced perpetrator arrive at the Muncey home late at night and tell Mrs. Muncey that her husband had been in a wreck near the creek. App. 19. Ms. Tharp relayed her testimony again at the evidentiary hearing, and the District Court determined that she was a "very credible witness." *Id.,* at 270, 323.

When police questioned House after witnesses reported seeing him emerge from the embankment near Mrs. Muncey's body shortly before it was discovered, he told two different officers that he never left Donna Turner's trailer the previous evening, even recounting the series of television programs he watched before going to bed. 7 Tr. 963–965, 1031–1032. He had worked to concoct an alibi we now know was a lie. On the day Mrs. Muncey's body was found, Bill Breeding, a criminal investigator at the Union County Sheriff's Office, observed House at the local jail and noticed that he had abrasions "across his knuckles and about his hands," two or three bruises on his right arm, scratches on his chest, and his right ring finger was red and swollen. 6 *id.,* at 801–802. The interviewing officers noticed similar injuries. App. 78–80; 7 Tr. 974–975. House told them that his finger was swollen because he fell off a porch, and the scratches and bruises were from tearing down a building, and from a cat. *Ibid.* Ms. Turner initially confirmed House's alibi, but she changed her story when police warned her that covering up a homicide was a serious offense. *Id.*, at 1063. Ms. Turner then told police that House had in fact left her house that night between 10:30 and 10:45 p.m. *Id.*, at 1062–1063. He came back some time later panting and sweating, shirtless and shoeless, and with various injuries. App. 88–91; 8 Tr. 1154–1155.

Also on the day the body was found, Sheriff Earl Loy asked House if he was wearing the same clothes he wore the night before. 6 *id.*, at 845. House "hesitated," then stated that he had changed his shirt, *but not his jeans*. *Ibid.* In other words, he specifically tried to conceal from the police that he had worn other jeans the night before, for reasons that were to become clear. Ms. Turner revealed that House's statement that he had not changed his jeans was a lie, and police retrieved House's dirty jeans from Ms. Turner's hamper. *Ibid.* Of course, FBI testing revealed that House's jeans were stained with Mrs. Muncey's blood, and the District Court determined that House's new evidence of blood spillage did not undermine those test results. App. 348. If in fact Mrs. Muncey's blood only got on House's jeans from later evidentiary spillage, House would have had no reason to lie to try to keep the existence of the concealed jeans from the police.

Through Ms. Turner's testimony at trial, the jury also heard House's story about what happened that night. He left Ms. Turner's trailer late at night to go for a walk. *Id.*, at 86. When he returned some time later—panting, sweating, and missing his shirt and shoes—he told her that some men in a truck tried to kill him. *Id.*, at 88–91. When Ms. Turner asked House about his injuries, he attributed them to fighting with his assailants. *Id.*, at 90; 8 Tr. 1154–1155. House retold this story to the District Court, saying that he initially lied to police because he was on parole and did not want to draw attention to himself. Record, Doc. 276, at 99, 108–109. In other words, having nothing to hide and facing a murder charge, House lied—and when he was caught in the lie, he said he lied not to escape the murder charge, but solely to avoid unexplained difficulties with his parole officer. The jury rejected House's story about the night's events, and the District Court "considered Mr. House's demeanor and found that he was not a credible witness." App. 329.

The jury also heard House's attempt to implicate Mr. Muncey in his wife's murder by calling Mrs. Muncey's brother, Ricky Green, as a witness. Mr. Green testified that two weeks before the murder, his sister called him to say that she and Mr. Muncey had been fighting, that she wanted to leave him, and that she was scared. 7 Tr. 1088. Mr. Green also testified that the Munceys had marital problems, and that he had previously seen Mr. Muncey hit his wife. *Id.*, at 1087. The jury rejected House's attempt to implicate Mr. Muncey, and the District Court was not persuaded by House's attempt to supplement this evidence at the evidentiary hearing, finding that his new witnesses were not credible. App. 348.

Noticeably absent from the State's story about what happened to Mrs. Muncey on the night of her death was much mention of the semen found on Mrs. Muncey's clothing. House's single victory at the evidentiary hearing was new DNA evidence proving that the semen was deposited by Mr. Muncey. The majority identifies the semen evidence as "[c]entral to the State's case" against House, *ante*, at 528, but House's jury would probably be quite surprised by this characterization. At trial, Agent Bigbee testified that from the semen stains on Mrs. Muncey's clothing, he could determine that the man who deposited the semen had type A blood, and was a secretor. App. 54–56. Agent Bigbee also testified that House and Mr. Muncey both have type A blood, that House is a secretor, and that "[t]here is an *eighty (80%) percent* chance that [Mr. Muncey] is a secretor." *Id.*, at 55–56; 6 Tr. 952 (emphasis added). Moreover, Agent Bigbee informed the jury that because 40 percent of people have type A blood, and 80 percent of those people are secretors, the semen on Mrs. Muncey's clothing could have been deposited by roughly one out of every three males. *Id.*, at 957. The jury was also informed several times by the defense that Mrs. Muncey's body was found fully clothed. See, *e. g.*, 4 *id.*, at 628; 9 *id.*, at 1274.

The majority describes House's sexual motive as "a central theme in the State's narrative linking House to the crime," and states that without the semen evidence, "a jury . . . would have found it necessary to establish some different motive, or, if the same motive, an intent far more speculative." *Ante*, at 541. The State, however, consistently directed the jury's attention *away* from motive, and sexual motive was far from a "central theme" of the State's case—presumably because of the highly ambiguous nature of the semen evidence recounted above. The Tennessee Supreme Court did not mention that evidence in cataloging the "[p]articularly incriminating" or "[d]amaging" evidence against House. App. 135. The State did not mention the semen evidence in its opening statement to the jury, instead focusing on premeditation. 4 Tr. 613–615. The defense used its opening statement to expose lack of motive as a weakness in the State's case. *Id.*, at 628. After the State's equivocal presentation of the semen evidence through Agent Bigbee's testimony at trial, the State again made no reference to the semen evidence or to a motive in its closing argument, prompting the defense to again highlight this omission. 9 *id.*, at 1274 ("[W]hy was Carolyn Muncey killed? We don't know. Is it important to have some motive? In your minds? What motive did Paul Gregory House have to go over and kill a woman that he barely knew? Who was still dressed, still clad in her clothes").

In rebuttal, the State disclaimed any responsibility to prove motive, again shifting the jury's focus to premeditation:

> "The law says that if you take another person's life, you beat them, you strangle them, and then you don't succeed, and then you kill them by giving them multiple blows to the head, and one massive blow to the head, and that that causes their brains to crash against the other side of their skull, and caused such severe bleeding inside the skull itself, that you die—that it does not make any difference under God's heaven, what the motive was. That is what the law is. The law is that if motive is shown, it can be considered by the jury as evidence of guilt. But the law is that if you prove that a killing was done, beyond a reasonable doubt, by a person, and that he premeditated it, he planned it, it is not necessary for the jury to conclude why he did it." App. 106.

As a followup to this explanation, when the trial was almost over and only in response to the defense's consistent prodding, the State made its first and only reference to a possible motive, followed immediately by another disclaimer:

> "Now, you may have an idea why he did it. The evidence at the scene which seemed to suggest that he was subjecting this lady to some kind of indignity, why would you get a lady out of her house, late at night, in her night clothes, under the trick that her husband has had a wreck down by the creek? . . . Why is it that you choke her? Why is it that you repeatedly beat her? Why is it that she has scrapes all over her body? Well, it is because either you don't want her to tell what indignities you have subjected her to, or she is unwilling and fights against you, against being subjected to those indignities. . . . That is what the evidence at the scene suggests about motive. But motive is not an element of the crime. It is something that you can consider, or ignore. Whatever you prefer. The issue is not motive. The issue is premeditation." *Id.*, at 106–107.

It is on this "obliqu[e]" reference to the semen evidence during the State's closing argument that the majority bases its assertion that House's sexual motive was a "central theme in the State's narrative." *Ante,* at 531, 541. Although it is possible that one or even some jurors might have entertained doubt about House's guilt absent the clearest evidence of motive, I do not find it more likely than not that *every* juror would have done so, and that is the legal standard under *Schlup.* The majority aphoristically states that "[w]hen identity is in question, motive is key." *Ante,* at 540. Not at all. Sometimes, when identity is in question, alibi is key. Here, House came up with one—and it fell apart, later admitted to be fabricated when his girlfriend would not lie to protect him. Scratches from a cat, indeed. Surely a reasonable juror would give the fact that an alibi had been made up and discredited significant weight. People facing a murder charge, who are innocent, do not make up a story out of concern that the truth might somehow disturb their parole officer. And people do not lie to the police about which jeans they were wearing the night of a murder, if they have no reason to believe the jeans would be stained with the blood shed by the victim in her last desperate struggle to live.

In *Schlup,* we made clear that the standard we adopted requires a "stronger showing than that needed to establish prejudice." 513 U. S., at 327. In other words, House must show more than just a "reasonable probability that . . . the factfinder would have had a reasonable doubt respecting guilt." *Strickland* v. *Washington,* 466 U. S. 668, 695 (1984). House must present such compelling evidence of innocence that it becomes more likely than not that no single juror, acting reasonably, would vote to convict him. *Schlup, supra,* at 329. The majority's conclusion is that given the sisters' testimony (if believed), and Dr. Blake's rebutted testimony about how to interpret Agent Bigbee's enzyme marker analysis summary (if accepted), combined with the revelation that the semen on Mrs. Muncey's clothing was deposited by her husband (which the jurors knew was just as likely as the semen having been deposited by House), no reasonable juror would vote to convict House. *Ante*, at 553–554. Given the District Court's reliability findings about the first two pieces of evidence, the evidence before us now is not substantially different from that considered by House's jury. I therefore find it more likely than not that in light of this new evidence, at least one juror, acting reasonably, would vote to convict House. The evidence as a whole certainly does not establish that House is actually innocent of the crime of murdering Carolyn Muncey, and accordingly I dissent.

# HILL *v.* McDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05–8794. Argued April 26, 2006—Decided June 12, 2006

Facing execution in Florida, petitioner Hill brought this federal action under 42 U. S. C. § 1983 to enjoin the three-drug lethal injection procedure the State likely would use on him. He alleged the procedure could cause him severe pain and thereby violate the Eighth Amendment's prohibition of cruel and unusual punishments. The District Court found that under controlling Eleventh Circuit precedent the § 1983 claim was the functional equivalent of a habeas petition. Because Hill had sought federal habeas relief earlier, the court deemed his petition successive and barred under 28 U. S. C. § 2244. The Eleventh Circuit agreed and affirmed.

*Held:* Because Hill's claim is comparable in its essentials to the § 1983 action the Court allowed to proceed in *Nelson* v. *Campbell*, 541 U. S. 637, it does not have to be brought in habeas, but may proceed under § 1983. Pp. 579–585.

(a) *Nelson* controls here. Although an inmate's challenge to the lawfulness of a sentence or confinement is the province of habeas corpus, *e. g., Muhammad* v. *Close*, 540 U. S. 749, 750, the *Nelson* Court declined to deem the instant § 1983 Eighth Amendment "challenge seeking to permanently enjoin the use of lethal injection . . . a challenge to the fact of the sentence itself," 541 U. S., at 644. Nelson's veins were severely compromised, and Alabama planned to apply an invasive surgical procedure to enable the injection. However, that procedure was not mandated by state law, and Nelson appeared willing to concede the existence of an acceptable alternative procedure. Absent a finding that the procedure was necessary to the lethal injection, the Court concluded, injunctive relief would not prevent the State from implementing the sentence. *Id.*, at 645–646. Here, as in *Nelson*, Hill's action if successful would not necessarily prevent the State from executing him by lethal injection. He does not challenge his sentence as a general matter but seeks only to enjoin respondents from executing him in a manner that allegedly causes a foreseeable risk of gratuitous and unnecessary pain. He concedes that other lethal injection methods the State could choose would be constitutional, and respondents do not contend, at least at this point, that an injunction would leave no other practicable, legal method of lethally injecting Hill. Florida law, moreover, does not require the use of the challenged procedure. Under these circumstances a grant of injunctive relief could not be seen as barring the execution of Hill's sentence. The fact that Hill challenges the chemical injection sequence rather than a preliminary surgical procedure does not change the analysis. In *Nelson,* the Court reasoned that "the gravamen of petitioner's entire claim" was that the surgical procedure was "gratuitous," *id.,* at 645, whereas Hill alleges that the procedure he challenges presents a risk of pain the State can avoid while still being able to enforce his sentence.

The Court rejects two rules proposed by respondents and their *amici* to counter the prospect of inmates filing successive § 1983 actions challenging one aspect of an execution procedure after another in order to forestall execution. First, the United States contends that a capital litigant's § 1983 action can proceed only if, as in *Nelson,* the prisoner identifies an alternative, authorized method of execution. Although Nelson's doing so supported the Court's conclusion that his suit need not proceed as a habeas action, that fact was not decisive. *Nelson* did not change the traditional pleading requirements for § 1983 actions. Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through federal courts' case-by-case determinations. Second, relying on cases barring § 1983 damages actions that, if successful, would imply the invalidation of an existing sentence or confinement, see, *e. g., Heck* v. *Humphrey,* 512 U. S. 477, respondents and the *amici* States contend that any challenge that would frustrate an execution as a practical matter must proceed in habeas. This argument cannot be squared with *Nelson*'s observation, 541 U. S., at 646–647, that its criterion—whether granting relief would necessarily bar the inmate's execution—is consistent with those cases. Because injunctive relief would not necessarily foreclose Florida from executing Hill by lethal injection under present law, it could not be said that this suit seeks to establish "unlawfulness [that] would render a conviction or sentence invalid," *Heck, supra,* at 486. Pp. 579–583.

(b) Filing a § 1983 action does not entitle the complainant to an automatic stay of execution. Such a stay is an equitable remedy not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from federal courts. Thus, inmates seeking time to challenge the manner of their execution must satisfy all of the requirements for a stay, including showing a significant possibility of success on the merits. A court considering a stay must also apply a strong equitable presumption against granting relief where the claim could have been brought at such a time as to allow consideration of the merits without requiring a stay. *Nelson, supra,* at 650. After *Nelson* federal courts have invoked their equitable powers to dismiss suits they saw as speculative or filed too late. Repetitive or piecemeal litigation presumably would raise similar concerns. States can and should be protected from dilatory or speculative suits, but it is not necessary to reject *Nelson* to do so. The equities and merits of Hill's underlying action are not before this Court. Pp. 583–585.

437 F. 3d 1084, reversed and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court.

*D. Todd Doss*, by appointment of the Court, 547 U. S. 1096, argued the cause for petitioner. With him on the briefs were *John Abatecola, Donald B. Verrilli, Jr.,* and *Ian Heath Gershengorn.*

*Carolyn M. Snurkowski,* Assistant Deputy Attorney General of Florida, argued the cause for respondents. With her on the brief was *Charles J. Crist, Jr.,* Attorney General.

*Kannon K. Shanmugam* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Clement, Assistant Attorney General Fisher, Deputy Solicitor General Garre,* and *Robert J. Erickson.**

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*Briefs of *amici curiae* urging reversal were filed for New Jerseyans for Alternatives to the Death Penalty by *John J. Gibbons* and *Lawrence S. Lustberg;* for Bradley A. MacLean et al. by *Thomas C. Goldstein, Amy Howe, Kevin K. Russell,* and *Pamela S. Karlan;* and for Darick Demorris Walker by *David W. Ogden* and *Hannah S. Ard.*

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Troy King,* Attorney General of Alabama, and *Kevin C. Newsom,* Solicitor General, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *Bill Lockyer* of California, *John W. Suthers* of Colorado, *Carl C. Danberg* of Delaware, *Thurbert E. Baker* of Georgia, *Lawrence G. Wasden* of Idaho, *Steve Carter* of Indiana, *Phill Kline* of Kansas, *Gregory D. Stumbo* of Kentucky, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *George J. Chanos* of Nevada, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.,* of Pennsylvania, *Paul G. Summers* of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Robert F. McDonnell* of

JUSTICE KENNEDY delivered the opinion of the Court.

Petitioner Clarence E. Hill challenges the constitutionality of a three-drug sequence the State of Florida likely would use to execute him by lethal injection. Seeking to enjoin the procedure, he filed this action in the United States District Court for the Northern District of Florida, pursuant to the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U. S. C. § 1983. The District Court and the Court of Appeals for the Eleventh Circuit construed the action as a petition for a writ of habeas corpus and ordered it dismissed for noncompliance with the requirements for a second and successive petition. The question before us is whether Hill's claim must be brought by an action for a writ of habeas corpus under the statute authorizing that writ, 28 U. S. C. § 2254, or whether it may proceed as an action for relief under 42 U. S. C. § 1983.

This is not the first time we have found it necessary to discuss which of the two statutes governs an action brought by a prisoner alleging a constitutional violation. See, *e. g.*, *Nelson* v. *Campbell*, 541 U. S. 637 (2004); *Heck* v. *Humphrey*, 512 U. S. 477 (1994); *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973). Hill's suit, we now determine, is comparable in its essentials to the action the Court allowed to proceed under § 1983 in *Nelson, supra*. In accord with that precedent we now reverse.

## I

In the year 1983, Hill was convicted of first-degree murder and sentenced to death. When his conviction and sentence became final some five years later, the method of execution then prescribed by Florida law was electrocution. Fla. Stat.

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Virginia, *Rob McKenna* of Washington, and *Patrick J. Crank* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Briefs of *amici curiae* were filed for the Habeas Corpus Resource Center by *Michael Laurence* and *Charles J. Press;* for Human Rights Advocates et al. by *David Weissbrodt;* for Physicians for Human Rights et al. by *Paul F. Enzinna;* and for Kevin Concannon et al. by *Ira S. Sacks.*

§ 922.10 (1987). On January 14, 2000—four days after the conclusion of Hill's first, unsuccessful round of federal habeas corpus litigation—Florida amended the controlling statute to provide: "A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution." § 922.105(1) (2003). The now-controlling statute, which has not been changed in any relevant respect, does not specify a particular lethal injection procedure. Implementation is the responsibility of the Florida Department of Corrections. See *ibid.*; *Sims* v. *State*, 754 So. 2d 657, 670 (Fla. 2000) *(per curiam)*. The department has not issued rules establishing a specific lethal injection protocol, and its implementing policies and procedures appear exempt from Florida's Administrative Procedure Act. See § 922.105(7).

After the statute was amended to provide for lethal injection, the Florida Supreme Court heard a death row inmate's claim that the execution procedure violated the Eighth Amendment's prohibition of cruel and unusual punishments. *Sims* v. *State*, *supra*. In *Sims*, the complainant, who had acquired detailed information about the procedure from the State, contended the planned three-drug sequence of injections would cause great pain if the drugs were not administered properly. 754 So. 2d, at 666–668. The Florida Supreme Court rejected this argument as too speculative. *Id.*, at 668.

On November 29, 2005, the Governor of Florida signed Hill's death warrant, which ordered him to be executed on January 24, 2006. Hill requested information about the lethal injection protocol, but the department provided none. App. 21, n. 3 (Verified Complaint for Declaratory & Injunctive Relief ¶ 15, n. 3 (hereinafter Complaint)). Hill then challenged, for the first time, the State's lethal injection procedure. On December 15, 2005, he filed a successive postconviction petition in state court, relying upon the Eighth Amendment. The trial court denied Hill's request for an evidentiary hearing and dismissed his claim as procedurally barred. The Florida Supreme Court affirmed on January 17, 2006. *Hill* v. *State*, 921 So. 2d 579, cert. denied, 546 U. S. 1219 (2006).

Three days later—and four days before his scheduled execution—Hill brought this action in District Court pursuant to 42 U. S. C. § 1983. Assuming the State would use the procedure discussed at length in the *Sims* decision, see App. 20–21, and n. 3 (Complaint ¶ 15, n. 3), Hill alleged that the first drug injected, sodium pentothal, would not be a sufficient anesthetic to render painless the administration of the second and third drugs, pancuronium bromide and potassium chloride. There was an ensuing risk, Hill alleged, that he could remain conscious and suffer severe pain as the pancuronium paralyzed his lungs and body and the potassium chloride caused muscle cramping and a fatal heart attack. *Id.*, at 18–21 (Complaint ¶¶ 9–16). The complaint sought an injunction "barring defendants from executing Plaintiff in the manner they currently intend." *Id.*, at 22 (Complaint ¶¶ 19–20).

The District Court found that under controlling Eleventh Circuit precedent the § 1983 claim was the functional equivalent of a petition for writ of habeas corpus. *Id.*, at 15 (relying on *Robinson* v. *Crosby*, 358 F. 3d 1281 (2004)). Because Hill had sought federal habeas corpus relief in an earlier action, the District Court deemed his petition successive and thus barred for failure to obtain leave to file from the Court of Appeals as required by 28 U. S. C. § 2244(b). On the day of the scheduled execution the Court of Appeals affirmed. It held that Hill's action was a successive petition and that it would deny any application for leave to file a successive petition because § 2244(b)(2) would not allow his claim to proceed. *Hill* v. *Crosby*, 437 F. 3d 1084, 1085 (CA11 2006). After issuing a temporary stay of execution, this Court granted Hill's petition for certiorari and continued the stay pending our resolution of the case. 546 U. S. 1158 (2006).

## II

"Federal law opens two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus, 28 U. S. C. §2254, and a complaint under the Civil Rights Act of 1871, Rev. Stat. §1979, as amended, 42 U. S. C. §1983. Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus." *Muhammad* v. *Close*, 540 U. S. 749, 750 (2004) *(per curiam)* (citing *Preiser*, 411 U. S., at 500). An inmate's challenge to the circumstances of his confinement, however, may be brought under §1983. 540 U. S., at 750.

In *Nelson* v. *Campbell*, 541 U. S. 637, we addressed whether a challenge to a lethal injection procedure must proceed as a habeas corpus action. The complainant had severely compromised peripheral veins, and Alabama planned to apply an invasive procedure on his arm or leg to enable the injection. He sought to enjoin the procedure, alleging it would violate the Eighth Amendment. The Court observed that the question whether a general challenge to a method of execution must proceed under habeas was a difficult one. The claim was not easily described as a challenge to the fact or duration of a sentence; yet in a State where the legislature has established lethal injection as the method of execution, "a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself." *Id.*, at 644.

*Nelson* did not decide this question. The lawsuit at issue, as the Court understood the case, did not require an injunction that would challenge the sentence itself. The invasive procedure in *Nelson* was not mandated by law, and the inmate appeared willing to concede the existence of an acceptable alternative procedure. *Id.*, at 645–646. Absent a finding that the challenged procedure was necessary to the lethal injection, the Court concluded, injunctive relief would not prevent the State from implementing the sentence. Consequently, the suit as presented would not be deemed a challenge to the fact of the sentence itself. See *ibid.*

The decision in *Nelson* also observed that its holding was congruent with the Court's precedents addressing civil rights suits for damages that implicate habeas relief. Those cases provide that prisoners' suits for damages can be barred from proceeding under § 1983 when a judgment in the prisoner's favor necessarily implies the invalidity of the prisoner's sentence. See, *e. g., Heck,* 512 U. S., at 487; *Close, supra,* at 751. The action in *Nelson,* however, was not analogous to a damages suit filed to circumvent the limits imposed by the habeas statute. The suit did not challenge an execution procedure required by law, so granting relief would not imply the unlawfulness of the lethal injection sentence. See 541 U. S., at 647.

In the case before us we conclude that Hill's § 1983 action is controlled by the holding in *Nelson.* Here, as in *Nelson,* Hill's action if successful would not necessarily prevent the State from executing him by lethal injection. The complaint does not challenge the lethal injection sentence as a general matter but seeks instead only to enjoin respondents "from executing [Hill] in the manner they currently intend." App. 22 (Complaint ¶ 20). The specific objection is that the anticipated protocol allegedly causes "a foreseeable risk of . . . gratuitous and unnecessary" pain. *Id.,* at 46 (Application for Stay of Execution and for Expedited Appeal). Hill concedes that "other methods of lethal injection the Department could choose to use would be constitutional," Brief for Petitioner 17, and respondents do not contend, at least to this point in the litigation, that granting Hill's injunction would leave the State without any other practicable, legal method of executing Hill by lethal injection. Florida law, moreover, does not require the department of corrections to use the challenged procedure. See Fla. Stat. §§ 922.105(1), (7) (prescribing lethal injection and leaving implementation to the department of corrections). Hill's challenge appears to leave the State free to use an alternative lethal injection procedure. Under these circumstances a grant of injunctive relief could not be seen as barring the execution of Hill's sentence.

One difference between the present case and *Nelson*, of course, is that Hill challenges the chemical injection sequence rather than a surgical procedure preliminary to the lethal injection. In *Nelson*, however, the State argued that the invasive procedure was not a medical operation separable from the lethal injection but rather a "necessary prerequisite to, and thus an indispensable part of, any lethal injection procedure." 541 U. S., at 645. The Court reasoned that although venous access was necessary for lethal injection, it did not follow that the State's chosen means of access were necessary; "the gravamen of petitioner's entire claim" was that the procedure was "gratuitous." *Ibid.* (emphasis deleted). The same is true here. Although the injection of lethal chemicals is an obvious necessity for the execution, Hill alleges that the challenged procedure presents a risk of pain the State can avoid while still being able to enforce the sentence ordering a lethal injection.

One concern is that the foregoing analysis may be more theoretical than real based on the practicalities of the case. A procedure that avoids the harms Hill alleges, for instance, may be susceptible to attack for other purported risks of its own. Respondents and their supporting *amici* thus contend that the legal distinction between habeas corpus and § 1983 actions must account for the practical reality of capital litigation tactics: Inmates file these actions intending to forestall execution, and *Nelson*'s emphasis on whether a suit challenges something "necessary" to the execution provides no endpoint to piecemeal litigation aimed at delaying the execution. Viewed in isolation, no single component of a given execution procedure may be strictly necessary, the argument goes, and a capital litigant may put off execution by challenging one aspect of a procedure after another. The *amici* States point to *Nelson*'s aftermath as a cautionary example, contending that on remand the District Court allowed Nelson to amend his complaint and that litigation over the constitutionality of Alabama's adopted alternative—one that Nelson had previously proposed—continues to this day. See Brief for State of Alabama et al. as *Amici Curiae* 7–14.

Respondents and their supporting *amici* conclude that two different rules should follow from these practical considerations. The United States as *amicus curiae* contends that a capital litigant's § 1983 action can proceed if, as in *Nelson, supra,* at 646, the prisoner identifies an alternative, authorized method of execution. A suit like Hill's that fails to do so, the United States maintains, is more like a claim challenging the imposition of any method of execution—which is to say, the execution itself—because it shows the complainant is unable or unwilling to concede acceptable alternatives "[e]xcept in the abstract." Brief for United States 14.

Although we agree courts should not tolerate abusive litigation tactics, see Part III, *infra,* even if the United States' proposed limitation were likely to be effective we could not accept it. It is true that the *Nelson* plaintiff's affirmative identification of an acceptable alternative supported our conclusion that the suit need not proceed as a habeas action. 541 U. S., at 646 (citing the inmate's complaint and affidavits). That fact, however, was not decisive. *Nelson* did not change the traditional pleading requirements for § 1983 actions. If the relief sought would foreclose execution, recharacterizing a complaint as an action for habeas corpus might be proper. See *id.,* at 644, 646. Cf. *Gonzalez* v. *Crosby,* 545 U. S. 524 (2005). Imposition of heightened pleading requirements, however, is quite a different matter. Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts. See Fed. Rules Civ. Proc. 8 and 9; *Swierkiewicz* v. *Sorema N. A.,* 534 U. S. 506, 512–514 (2002).

Respondents and the States as *amici* frame their argument differently. While not asking the Court in explicit terms to overrule *Nelson*, they contend a challenge to a procedure implicating the direct administration of an execution must proceed as a habeas action. Brief for Respondents 30–31; Brief for Alabama, *supra*, at 16–18. They rely on cases barring § 1983 damages actions that, if successful, would imply the invalidation of an existing sentence or confinement. See, *e. g., Edwards* v. *Balisok*, 520 U. S. 641 (1997); *Heck*, 512 U. S. 477. Those cases, they contend, demonstrate that the test of whether an action would undermine a sentence must "be applied functionally." Brief for Alabama, *supra*, at 16. By the same logic, it is said, a suit should be brought in habeas if it would frustrate the execution as a practical matter.

This argument cannot be squared with *Nelson*'s observation that its criterion—whether a grant of relief to the inmate would necessarily bar the execution—is consistent with *Heck*'s and *Balisok*'s approach to damages actions that implicate habeas relief. *Nelson, supra*, at 646–647. In those cases the question is whether "the nature of the challenge to the procedures could be such as necessarily to imply the invalidity" of the confinement or sentence. *Balisok, supra*, at 645. As discussed above, and at this stage of the litigation, the injunction Hill seeks would not necessarily foreclose the State from implementing the lethal injection sentence under present law, and thus it could not be said that the suit seeks to establish "unlawfulness [that] would render a conviction or sentence invalid." *Heck, supra*, at 486. Any incidental delay caused by allowing Hill to file suit does not cast on his sentence the kind of negative legal implication that would require him to proceed in a habeas action.

## III

Filing an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course. Both the State and the victims of crime have an important interest in the timely enforcement of a sentence. *Calderon* v. *Thompson,* 523 U. S. 538, 556 (1998). Our conclusions today do not diminish that interest, nor do they deprive federal courts of the means to protect it.

We state again, as we did in *Nelson,* that a stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts. 541 U. S., at 649–650. See *In re Blodgett,* 502 U. S. 236, 239–240 (1992) *(per curiam); Delo* v. *Stokes,* 495 U. S. 320, 323 (1990) (KENNEDY, J., concurring). Thus, like other stay applicants, inmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits. See *Barefoot* v. *Estelle,* 463 U. S. 880, 895–896 (1983). See also *Mazurek* v. *Armstrong,* 520 U. S. 968, 972 (1997) *(per curiam)* (preliminary injunction not granted unless the movant, by a clear showing, carries the burden of persuasion).

A court considering a stay must also apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson, supra,* at 650. See also *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.,* 503 U. S. 653, 654 (1992) *(per curiam)* (noting that the "last-minute nature of an application" or an applicant's "attempt at manipulation" of the judicial process may be grounds for denial of a stay).

After *Nelson* a number of federal courts have invoked their equitable powers to dismiss suits they saw as speculative or filed too late in the day. See, *e. g., Hicks* v. *Taft,* 431 F. 3d 916 (CA6 2005); *White* v. *Johnson,* 429 F. 3d 572 (CA5 2005); *Boyd* v. *Beck,* 404 F. Supp. 2d 879 (EDNC 2005). Although the particular determinations made in those cases are not before us, we recognize that the problem they address is significant. Repetitive or piecemeal litigation presumably would raise similar concerns. The federal courts can and should protect States from dilatory or speculative suits, but it is not necessary to reject *Nelson* to do so.

The equities and the merits of Hill's underlying action are also not before us. We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

# HUDSON *v.* MICHIGAN

## CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

No. 04–1360. Argued January 9, 2006—Reargued May 18, 2006—Decided June 15, 2006

Detroit police executing a search warrant for narcotics and weapons entered petitioner Hudson's home in violation of the Fourth Amendment's "knock-and-announce" rule. The trial court granted Hudson's motion to suppress the evidence seized, but the Michigan Court of Appeals reversed on interlocutory appeal. Hudson was convicted of drug possession. Affirming, the State Court of Appeals rejected Hudson's renewed Fourth Amendment claim.

*Held:* The judgment is affirmed.

Affirmed.

Justice Scalia delivered the opinion of the Court with respect to Parts I, II, and III, concluding that violation of the "knock-and-announce" rule does not require suppression of evidence found in a search. Pp. 589–599.

(a) Because Michigan has conceded that the entry here was a knock-and-announce violation, the only issue is whether the exclusionary rule is appropriate for such a violation. Pp. 589–590.

(b) This Court has rejected "[i]ndiscriminate application" of the exclusionary rule, *United States* v. *Leon,* 468 U. S. 897, 908, holding it applicable only "where its deterrence benefits outweigh its 'substantial social costs,'" *Pennsylvania Bd. of Probation and Parole* v. *Scott,* 524 U. S. 357, 363. Exclusion may not be premised on the mere fact that a constitutional violation was a "but-for" cause of obtaining the evidence. The illegal entry here was not the but-for cause, but even if it were, but-for causation can be too attenuated to justify exclusion. Attenuation can occur not only when the causal connection is remote, but also when suppression would not serve the interest protected by the constitutional guarantee violated. The interests protected by the knock-and-announce rule include human life and limb (because an unannounced entry may provoke violence from a surprised resident), property (because citizens presumably would open the door upon an announcement, whereas a forcible entry may destroy it), and privacy and dignity of the sort that can be offended by a sudden entrance. But the rule has never protected one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests violated here have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable. Pp. 590–594.

(c) The social costs to be weighed against deterrence are considerable here. In addition to the grave adverse consequence that excluding relevant incriminating evidence always entails—the risk of releasing dangerous criminals—imposing such a massive remedy would generate a constant flood of alleged failures to observe the rule, and claims that any asserted justification for a no-knock entry had inadequate support. Another consequence would be police officers' refraining from timely entry after knocking and announcing, producing preventable violence against the officers in some cases, and the destruction of evidence in others. Next to these social costs are the deterrence benefits. The value of deterrence depends on the strength of the incentive to commit the forbidden act. That incentive is minimal here, where ignoring knock-and-announce can realistically be expected to achieve nothing but the prevention of evidence destruction and avoidance of life-threatening resistance, dangers which suspend the requirement when there is "reasonable suspicion" that they exist, *Richards* v. *Wisconsin*, 520 U. S. 385, 394. Massive deterrence is hardly necessary. Contrary to Hudson's argument that without suppression there will be no deterrence, many forms of police misconduct are deterred by civil-rights suits, and by the consequences of increasing professionalism of police forces, including a new emphasis on internal police discipline. Pp. 594–599.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO, concluded in Part IV that *Segura* v. *United States*, 468 U. S. 796, *New York* v. *Harris*, 495 U. S. 14, and *United States* v. *Ramirez*, 523 U. S. 65, confirm the conclusion that suppression is unwarranted in this case. Pp. 599–602.

SCALIA, J., delivered the opinion of the Court with respect to Parts I, II, and III, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined, and an opinion with respect to Part IV, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 602. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 604.

*David A. Moran* argued and reargued the cause for petitioner. With him on the briefs were *Timothy O'Toole*, *Steven R. Shapiro*, *Michael J. Steinberg*, *Kary L. Moss*, and *Richard D. Korn*.

*Timothy A. Baughman* argued and reargued the cause and filed a brief for respondent.

*David B. Salmons* argued and reargued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Clement, Assistant Attorney General Fisher, Deputy Solicitor General Dreeben,* and *Deborah Watson.**

JUSTICE SCALIA delivered the opinion of the Court, except as to Part IV.

We decide whether violation of the "knock-and-announce" rule requires the suppression of all evidence found in the search.

## I

Police obtained a warrant authorizing a search for drugs and firearms at the home of petitioner Booker Hudson. They discovered both. Large quantities of drugs were found, including cocaine rocks in Hudson's pocket. A loaded gun was lodged between the cushion and armrest of the chair in which he was sitting. Hudson was charged under Michigan law with unlawful drug and firearm possession.

This case is before us only because of the method of entry into the house. When the police arrived to execute the warrant, they announced their presence, but waited only a short time—perhaps "three to five seconds," App. 15—before turning the knob of the unlocked front door and entering Hudson's home. Hudson moved to suppress all the inculpatory evidence, arguing that the premature entry violated his Fourth Amendment rights.

The Michigan trial court granted his motion. On interlocutory review, the Michigan Court of Appeals reversed, relying on Michigan Supreme Court cases holding that suppression is inappropriate when entry is made pursuant to warrant but without proper "'knock and announce.'" App. to Pet. for Cert. 4 (citing *People* v. *Vasquez,* 461 Mich. 235, 602 N. W. 2d 376 (1999) *(per curiam); People* v. *Stevens,* 460 Mich. 626, 597 N. W. 2d 53 (1999)). The Michigan Supreme Court denied leave to appeal. 465 Mich. 932, 639 N. W. 2d 255 (2001). Hudson was convicted of drug possession. He renewed his Fourth Amendment claim on appeal, but the Court of Appeals rejected it and affirmed the conviction. App. to Pet. for Cert. 1–2. The Michigan Supreme Court again declined review. 472 Mich. 862, 692 N. W. 2d 385 (2005). We granted certiorari. 545 U. S. 1138 (2005).

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**Tracey Maclin, Timothy Lynch,* and *Joshua L. Dratel* filed a brief for the Cato Institute et al. as *amici curiae* urging reversal.

*Kent S. Scheidegger* and *Charles L. Hobson* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

## II

The common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one. See *Wilson* v. *Arkansas,* 514 U. S. 927, 931–932 (1995). Since 1917, when Congress passed the Espionage Act, this traditional protection has been part of federal statutory law, see 40 Stat. 229, and is currently codified at 18 U. S. C. § 3109. We applied that statute in *Miller* v. *United States,* 357 U. S. 301 (1958), and again in *Sabbath* v. *United States,* 391 U. S. 585 (1968). Finally, in *Wilson,* we were asked whether the rule was also a command of the Fourth Amendment. Tracing its origins in our English legal heritage, 514 U. S., at 931–936, we concluded that it was.

We recognized that the new constitutional rule we had announced is not easily applied. *Wilson* and cases following it have noted the many situations in which it is not necessary to knock and announce. It is not necessary when "circumstances presen[t] a threat of physical violence," or if there is "reason to believe that evidence would likely be destroyed if advance notice were given," *id.,* at 936, or if knocking and announcing would be "futile," *Richards* v. *Wisconsin*, 520 U. S. 385, 394 (1997). We require only that police "have a reasonable suspicion . . . under the particular circumstances" that one of these grounds for failing to knock and announce exists, and we have acknowledged that "[t]his showing is not high." *Ibid.*

When the knock-and-announce rule does apply, it is not easy to determine precisely what officers must do. How many seconds' wait are too few? Our "reasonable wait time" standard, see *United States* v. *Banks*, 540 U. S. 31, 41 (2003), is necessarily vague. *Banks* (a drug case, like this one) held that the proper measure was not how long it would take the resident to reach the door, but how long it would take to dispose of the suspected drugs—but that such a time (15 to 20 seconds in that case) would necessarily be extended when, for instance, the suspected contraband was not easily concealed. *Id.*, at 40–41. If our *ex post* evaluation is subject to such calculations, it is unsurprising that, *ex ante*, police officers about to encounter someone who may try to harm them will be uncertain how long to wait.

Happily, these issues do not confront us here. From the trial level onward, Michigan has conceded that the entry was a knock-and-announce violation. The issue here is remedy. *Wilson* specifically declined to decide whether the exclusionary rule is appropriate for violation of the knock-and-announce requirement. 514 U. S., at 937, n. 4. That question is squarely before us now.

## III

### A

In *Weeks* v. *United States*, 232 U. S. 383 (1914), we adopted the federal exclusionary rule for evidence that was unlawfully seized from a home without a warrant in violation of the Fourth Amendment. We began applying the same rule to the States, through the Fourteenth Amendment, in *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates "substantial social costs," *United States* v. *Leon*, 468 U. S. 897, 907 (1984), which sometimes include setting the guilty free and the dangerous at large. We have therefore been "cautio[us] against expanding" it, *Colorado* v. *Connelly*, 479 U. S. 157, 166 (1986), and "have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application," *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 364–365 (1998). We have rejected "[i]ndiscriminate application" of the rule, *Leon*, *supra*, at 908, and have held it to be applicable only "where its remedial objectives are thought most efficaciously served," *United States* v. *Calandra*, 414 U. S. 338, 348 (1974)—that is, "where its deterrence benefits outweigh its 'substantial social costs,'" *Scott*, *supra*, at 363 (quoting *Leon*, *supra*, at 907).

We did not always speak so guardedly. Expansive dicta in *Mapp*, for example, suggested wide scope for the exclusionary rule. See, *e. g.*, 367 U. S., at 655 ("[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court"). *Whiteley* v. *Warden, Wyo. State Penitentiary*, 401 U. S. 560, 568–569 (1971), was to the same effect. But we have long since rejected that approach. As explained in *Arizona* v. *Evans*, 514 U. S. 1, 13 (1995): "In *Whiteley*, the Court treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation. Subsequent case law has rejected this reflexive application of the exclusionary rule." (Citation omitted.) We had said as much in *Leon*, a decade earlier, when we explained that "[w]hether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" 468 U. S., at 906 (quoting *Illinois* v. *Gates*, 462 U. S. 213, 223 (1983)).

In other words, exclusion may not be premised on the mere fact that a constitutional violation was a "but-for" cause of obtaining evidence. Our cases show that but-for causality is only a necessary, not a sufficient, condition for suppression. In this case, of course, the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence. Whether that preliminary misstep had occurred *or not*, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house. But even if the illegal entry here could be characterized as a but-for cause of discovering what was inside, we have "never held that evidence is 'fruit of the poisonous tree' simply because 'it would not have come to light but for the illegal actions of the police.'" *Segura* v. *United States*, 468 U. S. 796, 815 (1984). See also *id.*, at 829 (STEVENS, J., dissenting) ("We have not . . . mechanically applied the [exclusionary] rule to every item of evidence that has a causal connection with police misconduct"). Rather, but-for cause, or "causation in the logical sense alone," *United States* v. *Ceccolini*, 435 U. S. 268, 274 (1978), can be too attenuated to justify exclusion, *id.*, at 274–275. Even in the early days of the exclusionary rule, we declined to

> "hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light *but for* the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Wong Sun* v. *United States*, 371 U. S. 471, 487–488 (1963) (quoting J. Maguire, Evidence of Guilt 221 (1959); emphasis added).

Attenuation can occur, of course, when the causal connection is remote. See, *e. g., Nardone* v. *United States,* 308 U. S. 338, 341 (1939). Attenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. "The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve." *Ceccolini, supra,* at 279. Thus, in *New York* v. *Harris,* 495 U. S. 14 (1990), where an illegal warrantless arrest was made in Harris's house, we held:

> "[S]uppressing [Harris's] statement taken outside the house would not serve the purpose of the rule that made Harris' in-house arrest illegal. The warrant requirement for an arrest in the home is imposed to protect the home, and anything incriminating the police gathered from arresting Harris in his home, rather than elsewhere, has been excluded, as it should have been; the purpose of the rule has thereby been vindicated." *Id.,* at 20.

For this reason, cases excluding the fruits of unlawful warrantless searches, see, *e. g., Boyd* v. *United States,* 116 U. S. 616 (1886); *Weeks,* 232 U. S. 383; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920); *Mapp, supra,* say nothing about the appropriateness of exclusion to vindicate the interests protected by the knock-and-announce requirement. Until a valid warrant has issued, citizens are entitled to shield "their persons, houses, papers, and effects," U. S. Const., Amdt. 4, from the government's scrutiny. Exclusion of the evidence obtained by a warrantless search vindicates that entitlement. The interests protected by the knock-and-announce requirement are quite different—and do not include the shielding of potential evidence from the government's eyes.

One of those interests is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. See, *e. g.*, *McDonald* v. *United States*, 335 U. S. 451, 460–461 (1948) (Jackson, J., concurring). See also *Sabbath*, 391 U. S., at 589; *Miller*, 357 U. S., at 313, n. 12. Another interest is the protection of property. Breaking a house (as the old cases typically put it) absent an announcement would penalize someone who "'did not know of the process, of which, if he had notice, it is to be presumed that he would obey it . . . .'" *Wilson*, 514 U. S., at 931–932 (quoting *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195–196 (K. B. 1603)). The knock-and-announce rule gives individuals "the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry." *Richards*, 520 U. S., at 393, n. 5. See also *Banks*, 540 U. S., at 41. And thirdly, the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the "opportunity to prepare themselves for" the entry of the police. *Richards*, 520 U. S., at 393, n. 5. "The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed." *Ibid.* In other words, it assures the opportunity to collect oneself before answering the door.

What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.

## B

Quite apart from the requirement of unattenuated causation, the exclusionary rule has never been applied except "where its deterrence benefits outweigh its 'substantial social costs,'" *Scott*, 524 U. S., at 363 (quoting *Leon*, 468 U. S., at 907). The costs here are considerable. In addition to the grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing dangerous criminals into society), imposing that massive remedy for a knock-and-announce violation would generate a constant flood of alleged failures to observe the rule, and claims that any asserted *Richards* justification for a no-knock entry, see 520 U. S., at 394, had inadequate support. Cf. *United States* v. *Singleton,* 441 F. 3d 290, 293–294 (CA4 2006). The cost of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card. Courts would experience as never before the reality that "[t]he exclusionary rule frequently requires extensive litigation to determine whether particular evidence must be excluded." *Scott, supra,* at 366. Unlike the warrant or *Miranda* requirements, compliance with which is readily determined (either there was or was not a warrant; either the *Miranda* warning was given, or it was not), what constituted a "reasonable wait time" in a particular case, *Banks, supra,* at 41 (or, for that matter, how many seconds the police in fact waited), or whether there was "reasonable suspicion" of the sort that would invoke the *Richards* exceptions, is difficult for the trial court to determine and even more difficult for an appellate court to review.

Another consequence of the incongruent remedy Hudson proposes would be police officers' refraining from timely entry after knocking and announcing. As we have observed, see *supra,* at 590, the amount of time they must wait is necessarily uncertain. If the consequences of running afoul of the rule were so massive, officers would be inclined to wait longer than the law requires—producing preventable violence against officers in some cases, and the destruction of evidence in many others. See *Gates,* 462 U. S., at 258 (White, J., concurring in judgment). We deemed these consequences severe enough to produce our unanimous agreement that a mere "reasonable suspicion" that knocking and announcing "under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime," will cause the requirement to yield. *Richards, supra,* at 394.

Next to these "substantial social costs" we must consider the deterrence benefits, existence of which is a necessary condition for exclusion. (It is not, of course, a sufficient condition: "[I]t does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct." *Calandra,* 414 U. S., at 350; see also *Leon, supra,* at 910.) To begin with, the value of deterrence depends upon the strength of the incentive to commit the forbidden act. Viewed from this perspective, deterrence of knock-and-announce violations is not worth a lot. Violation of the warrant requirement sometimes produces incriminating evidence that could not otherwise be obtained. But ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises—dangers which, if there is even "reasonable suspicion" of their existence, *suspend the knock-and-announce requirement anyway.* Massive deterrence is hardly required.

It seems to us not even true, as Hudson contends, that without suppression there will be no deterrence of knock-and-announce violations at all. Of course even if this assertion were accurate, it would not necessarily justify suppression. Assuming (as the assertion must) that civil suit is not an effective deterrent, one can think of many forms of police misconduct that are similarly "undeterred." When, for example, a confessed suspect in the killing of a police officer, arrested (along with incriminating evidence) in a lawful warranted search, is subjected to physical abuse at the station house, would it seriously be suggested that the evidence must be excluded, since that is the only "effective deterrent"? And what, other than civil suit, is the "effective deterrent" of police violation of an already-confessed suspect's Sixth Amendment rights by denying him prompt access to counsel? Many would regard these violated rights as more significant than the right not to be intruded upon in one's nightclothes—and yet nothing but "ineffective" civil suit is available as a deterrent. And the police incentive for those violations is arguably greater than the incentive for disregarding the knock-and-announce rule.

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago. Dollree Mapp could not turn to Rev. Stat. § 1979, 42 U. S. C. § 1983, for meaningful relief; *Monroe* v. *Pape,* 365 U. S. 167 (1961), which began the slow but steady expansion of that remedy, was decided the same Term as *Mapp.* It would be another 17 years before the § 1983 remedy was extended to reach the deep pocket of municipalities, *Monell* v. *New York City Dept. of Social Servs.,* 436 U. S. 658 (1978). Citizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after *Mapp,* with this Court's decision in *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971).

Hudson complains that "it would be very hard to find a lawyer to take a case such as this," Tr. of Oral Arg. 7, but 42 U. S. C. § 1988(b) answers this objection. Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney's fees for civil-rights plaintiffs. This remedy was unavailable in the heydays of our exclusionary-rule jurisprudence, because it is tied to the availability of a cause of action. For years after *Mapp,* "very few lawyers would even consider representation of persons who had civil rights claims against the police," but now "much has changed. Citizens and lawyers are much more willing to seek relief in the courts for police misconduct." M. Avery, D. Rudovsky, & K. Blum, Police Misconduct: Law and Litigation, p. v (3d ed. 2005); see generally N. Aron, Liberty and Justice for All: Public Interest Law in the 1980s and Beyond (1989) (describing the growth of public-interest law). The number of public-interest law firms and lawyers who specialize in civil-rights grievances has greatly expanded.

Hudson points out that few published decisions to date announce huge awards for knock-and-announce violations. But this is an unhelpful statistic. Even if we thought that only large damages would deter police misconduct (and that police somehow are deterred by "damages" but indifferent to the prospect of large § 1988 attorney's fees), we do not know how many claims have been settled, or indeed how many violations have occurred that produced anything more than nominal injury. It is clear, at least, that the lower courts are allowing colorable knock-and-announce suits to go forward, unimpeded by assertions of qualified immunity. See, *e. g., Green* v. *Butler,* 420 F. 3d 689, 700–701 (CA7 2005) (denying qualified immunity in a knock-and-announce civil suit); *Holland ex rel. Overdorff* v. *Harrington,* 268 F. 3d 1179, 1193–1196 (CA10 2001) (same); *Mena* v. *Simi Valley,* 226 F. 3d 1031, 1041–1042 (CA9 2000) (same); *Gould* v. *Davis,* 165 F. 3d 265, 270–271 (CA4 1998) (same). As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts. See, *e. g., Correctional Services Corp.* v. *Malesko,* 534 U. S. 61, 70 (2001) ("[T]he threat of litigation and liability will adequately deter federal officers for *Bivens* purposes no matter that they may enjoy qualified immunity" (as violators of knock-and-announce do not)); see also *Nix* v. *Williams,* 467 U. S. 431, 446 (1984).

Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline. Even as long ago as 1980 we felt it proper to "assume" that unlawful police behavior would "be dealt with appropriately" by the authorities, *United States* v. *Payner*, 447 U. S. 727, 733–734, n. 5 (1980), but we now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously. There have been "wide-ranging reforms in the education, training, and supervision of police officers." S. Walker, Taming the System: The Control of Discretion in Criminal Justice 1950–1990, p. 51 (1993). Numerous sources are now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline. See, *e. g.*, D. Waksman & D. Goodman, The Search and Seizure Handbook (2d ed. 2006); A. Stone & S. DeLuca, Police Administration: An Introduction (2d ed. 1994); E. Thibault, L. Lynch, & R. McBride, Proactive Police Management (4th ed. 1998). Failure to teach and enforce constitutional requirements exposes municipalities to financial liability. See *Canton* v. *Harris*, 489 U. S. 378, 388 (1989). Moreover, modern police forces are staffed with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect. There is also evidence that the increasing use of various forms of citizen review can enhance police accountability.

In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrences against them are substantial—incomparably greater than the factors deterring warrantless entries when *Mapp* was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified.

## IV

A trio of cases—*Segura* v. *United States*, 468 U. S. 796 (1984); *New York* v. *Harris*, 495 U. S. 14 (1990); and *United*

*States* v. *Ramirez*, 523 U. S. 65 (1998)—confirms our conclusion that suppression is unwarranted in this case.

Like today's case, *Segura* involved a concededly illegal entry. Police conducting a drug crime investigation waited for Segura outside an apartment building; when he arrived, he denied living there. The police arrested him and brought him to the apartment where they suspected illegal activity. An officer knocked. When someone inside opened the door, the police entered, taking Segura with them. They had neither a warrant nor consent to enter, and they did not announce themselves as police—an entry as illegal as can be. Officers then stayed in the apartment for *19 hours* awaiting a search warrant. 468 U. S., at 800–801; *id.*, at 818–819 (STEVENS, J., dissenting). Once alerted that the search warrant had been obtained, the police—still inside, having secured the premises so that no evidence could be removed—conducted a search. *Id.*, at 801. We refused to exclude the resulting evidence. We recognized that only the evidence gained from the particular violation could be excluded, see *id.*, at 799, 804–805, and therefore distinguished the effects of the illegal entry from the effects of the legal search: "None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment . . . ," *id.*, at 814. It was therefore "beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged." *Ibid.*

If the search in *Segura* could be "wholly unrelated to the prior entry," *ibid.*, when the only entry was warrantless, it would be bizarre to treat more harshly the actions in this case, where the only entry was *with* a warrant. If the probable cause backing a warrant that was issued *later in time* could be an "independent source" for a search that proceeded after the officers illegally entered and waited, a search warrant obtained *before* going in must have at least this much effect.[1]

In the second case, *Harris*, the police violated the defendant's Fourth Amendment rights by arresting him at home without a warrant, contrary to *Payton* v. *New York*, 445 U. S. 573 (1980). Once taken to the station house, he gave an incriminating statement. See 495 U. S., at 15–16. We refused to exclude it. Like the illegal entry which led to discovery of the evidence in today's case, the illegal arrest in *Harris* began a process that culminated in acquisition of the evidence sought to be excluded. While Harris's statement was "the product of an arrest and being in custody," it "was not the fruit of the fact that the arrest was made in the house rather than someplace else." *Id.*, at 20. Likewise here: While acquisition of the gun and drugs was the product of a search pursuant to warrant, it was not the fruit of the fact that the entry was not preceded by knock-and-announce.[2]

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[1] JUSTICE BREYER's insistence that the warrant in *Segura* was "obtained independently without use of any information found during the illegal entry," *post*, at 617 (dissenting opinion), entirely fails to distinguish it from the warrant in the present case. Similarly inapposite is his appeal to Justice Frankfurter's statement in *Wolf* v. *Colorado*, 338 U. S. 25, 28 (1949), that the "'knock at the door, . . . as a prelude to a search, without authority of law . . . [is] inconsistent with the conception of human rights enshrined in [our] history,'" see *post*, at 620. "How much the more offensive," JUSTICE BREYER asserts, "when the search takes place without any knock at all," *ibid.* But a no-knock entry "without authority of law" (*i. e.*, without a search warrant) describes not this case, but *Segura*—where the evidence was admitted anyway.

JUSTICE BREYER's assertion that *Segura*, unlike our decision in the present case, had no effect on deterrence, see *post*, at 625–626, does not comport with the views of the *Segura* dissent. See, *e. g.*, 468 U. S., at 817 (STEVENS, J., dissenting) ("The Court's disposition, I fear, will provide government agents with an affirmative incentive to engage in unconstitutional violations of the privacy of the home").

[2] *Harris* undermines two key points of the dissent. First, the claim that "whether the interests underlying the knock-and-announce rule are implicated in any given case is, in a sense, beside the point," *post*, at

*United States* v. *Ramirez, supra,* involved a claim that police entry violated the Fourth Amendment because it was effected by breaking a window. We ultimately concluded that the property destruction was, under all the circumstances, reasonable, but in the course of our discussion we unanimously said the following: "[D]estruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression." *Id.,* at 71. Had the breaking of the window been unreasonable, the Court said, it would have been necessary to determine whether there had been a "sufficient causal relationship between the breaking of the window and the discovery of the guns to warrant suppression of the evidence." *Id.,* at 72, n. 3. What clearer expression could there be of the proposition that an impermissible manner of entry does not necessarily trigger the exclusionary rule?

* * *

For the foregoing reasons we affirm the judgment of the Michigan Court of Appeals.

*It is so ordered.*

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

Two points should be underscored with respect to today's decision. First, the knock-and-announce requirement protects rights and expectations linked to ancient principles in our constitutional order. See *Wilson* v. *Arkansas,* 514 U. S. 927, 934 (1995). The Court's decision should not be interpreted as suggesting that violations of the requirement are

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621. This is flatly refuted by *Harris*'s plain statement that the reason for a rule must govern the sanctions for the rule's violation. 495 U. S., at 17, 20; see also *supra,* at 593. Second, the dissent's attempt to turn *Harris* into a vindication of the sanctity of the home, see *post,* at 626–628. The whole point of the case was that a confession that police obtained by illegally removing a man from the sanctity of his home was admissible against him.

trivial or beyond the law's concern. Second, the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt. Today's decision determines only that in the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression.

As to the basic right in question, privacy and security in the home are central to the Fourth Amendment's guarantees as explained in our decisions and as understood since the beginnings of the Republic. This common understanding ensures respect for the law and allegiance to our institutions, and it is an instrument for transmitting our Constitution to later generations undiminished in meaning and force. It bears repeating that it is a serious matter if law enforcement officers violate the sanctity of the home by ignoring the requisites of lawful entry. Security must not be subject to erosion by indifference or contempt.

Our system, as the Court explains, has developed procedures for training police officers and imposing discipline for failures to act competently and lawfully. If those measures prove ineffective, they can be fortified with more detailed regulations or legislation. Supplementing these safeguards are civil remedies, such as those available under Rev. Stat. § 1979, 42 U. S. C. § 1983, that provide restitution for discrete harms. These remedies apply to all violations, including, of course, exceptional cases in which unannounced entries cause severe fright and humiliation.

Suppression is another matter. Under our precedents the causal link between a violation of the knock-and-announce requirement and a later search is too attenuated to allow suppression. Cf. *United States* v. *Ramirez,* 523 U. S. 65, 72, n. 3 (1998) (application of the exclusionary rule depends on the existence of a "sufficient causal relationship" between the unlawful conduct and the discovery of evidence). When, for example, a violation results from want of a 20-second pause but an ensuing, lawful search lasting five hours discloses evidence of criminality, the failure to wait at the door cannot properly be described as having caused the discovery of evidence.

Today's decision does not address any demonstrated pattern of knock-and-announce violations. If a widespread pattern of violations were shown, and particularly if those violations were committed against persons who lacked the means or voice to mount an effective protest, there would be reason for grave concern. Even then, however, the Court would have to acknowledge that extending the remedy of exclusion to all the evidence seized following a knock-and-announce violation would mean revising the requirement of causation that limits our discretion in applying the exclusionary rule. That type of extension also would have significant practical implications, adding to the list of issues requiring resolution at the criminal trial questions such as whether police officers entered a home after waiting 10 seconds or 20.

In this case the relevant evidence was discovered not because of a failure to knock and announce, but because of a subsequent search pursuant to a lawful warrant. The Court in my view is correct to hold that suppression was not required. While I am not convinced that *Segura* v. *United States,* 468 U. S. 796 (1984), and *New York* v. *Harris,* 495 U. S. 14 (1990), have as much relevance here as JUSTICE SCALIA appears to conclude, the Court's holding is fully supported by Parts I through III of its opinion. I accordingly join those Parts and concur in the judgment.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

In *Wilson* v. *Arkansas,* 514 U. S. 927 (1995), a unanimous Court held that the Fourth Amendment normally requires law enforcement officers to knock and announce their presence before entering a dwelling. Today's opinion holds that evidence seized from a home following a violation of this requirement need not be suppressed.

As a result, the Court destroys the strongest legal incentive to comply with the Constitution's knock-and-announce requirement. And the Court does so without significant support in precedent. At least I can find no such support in the many Fourth Amendment cases the Court has decided in the near century since it first set forth the exclusionary principle in *Weeks* v. *United States*, 232 U. S. 383 (1914). See Appendix, *infra.*

Today's opinion is thus doubly troubling. It represents a significant departure from the Court's precedents. And it weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection.

## I

This Court has set forth the legal principles that ought to have determined the outcome of this case in two sets of basic Fourth Amendment cases. I shall begin by describing that underlying case law.

### A

The first set of cases describes the constitutional knock-and-announce requirement, a requirement that this Court initially set forth only 11 years ago in *Wilson, supra.* Cf. *Sabbath* v. *United States*, 391 U. S. 585 (1968) (suppressing evidence seized in violation of federal statutory knock-and-announce requirement); *Miller* v. *United States*, 357 U. S. 301 (1958) (same). In *Wilson*, tracing the lineage of the knock-and-announce rule back to the 13th century, 514 U. S., at 932, and n. 2, we wrote that

> "[a]n examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering." *Id.*, at 931.

We noted that this "basic principle" was agreed upon by "[s]everal prominent founding-era commentators," *id.*, at 932, and "was woven quickly into the fabric of early American law" via state constitutions and statutes, *id.,* at 933. We further concluded that there was

> "little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure." *Id.,* at 934.

And we held that the "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." *Id.,* at 929. Thus, "a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement." *Id.,* at 936; see *United States* v. *Banks,* 540 U. S. 31, 36 (2003); *United States* v. *Ramirez,* 523 U. S. 65, 70 (1998); *Richards* v. *Wisconsin,* 520 U. S. 385, 387 (1997).

### B

The second set of cases sets forth certain well-established principles that are relevant here. They include:

*Boyd* v. *United States,* 116 U. S. 616 (1886). In this seminal Fourth Amendment case, decided 120 years ago, the Court wrote, in frequently quoted language, that the Fourth Amendment's prohibitions apply

> "to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property." *Id.,* at 630.

*Weeks, supra.* This case, decided 28 years after *Boyd,* originated the exclusionary rule. The Court held that the Federal Government could not retain evidence seized unconstitutionally and use that evidence in a federal criminal trial. The Court pointed out that "[i]f letters and private documents" could be unlawfully seized from a home "and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution." 232 U. S., at 393.

*Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920). This case created an exception to (or a qualification of) *Weeks'* exclusionary rule. The Court held that the Government could not use information obtained during an illegal search to subpoena documents that they illegally viewed during that search. Writing for the Court, Justice Holmes noted that the exclusionary rule "does not mean that the facts [unlawfully] obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others . . . ." 251 U. S., at 392. *Silverthorne* thus stands for the proposition that the exclusionary rule does not apply if the evidence in question (or the "fruits" of that evidence) was obtained through a process unconnected with, and untainted by, the illegal search. Cf. *Nix* v. *Williams,* 467 U. S. 431, 444 (1984) (describing related "inevitable discovery" exception).

*Wolf* v. *Colorado,* 338 U. S. 25 (1949), and *Mapp* v. *Ohio,* 367 U. S. 643 (1961). Both of these cases considered whether *Weeks'* exclusionary rule applies to the States. In *Wolf,* the Court held that it did not. It said that "[t]he security of one's privacy against arbitrary intrusion by the police . . . is . . . implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." 338 U. S., at 27–28. But the Court held that the exclusionary rule is not enforceable against the States as "an essential ingredient of the right." *Id.,* at 29. In *Mapp,* the Court overruled *Wolf.* Experience, it said, showed that alternative methods of enforcing the Fourth Amendment's requirements had failed. See 367 U. S., at 651–653; see, *e. g.*, *People* v. *Cahan*, 44 Cal. 2d 434, 447, 282 P. 2d 905, 913 (1955) (majority opinion of Traynor, J.) ("Experience [in California] has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures"). The Court consequently held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Mapp*, 367 U. S., at 655. "To hold otherwise," the Court added, would be "to grant the right but in reality to withhold its privilege and enjoyment." *Id.*, at 656.

## II

Reading our knock-and-announce cases, Part I–A, *supra*, in light of this foundational Fourth Amendment case law, Part I–B, *supra*, it is clear that the exclusionary rule should apply. For one thing, elementary logic leads to that conclusion. We have held that a court must "conside[r]" whether officers complied with the knock-and-announce requirement "in assessing the reasonableness of a search or seizure." *Wilson*, 514 U. S., at 934; see *Banks*, *supra*, at 36. The Fourth Amendment insists that an unreasonable search or seizure is, constitutionally speaking, an illegal search or seizure. And ever since *Weeks* (in respect to federal prosecutions) and *Mapp* (in respect to state prosecutions), "the use of evidence secured through an illegal search and seizure" is "barred" in criminal trials. *Wolf*, *supra*, at 28 (citing *Weeks*, 232 U. S. 383); see *Mapp*, *supra*, at 655.

For another thing, the driving legal purpose underlying the exclusionary rule, namely, the deterrence of unlawful government behavior, argues strongly for suppression. See *Elkins* v. *United States*, 364 U. S. 206, 217 (1960) (purpose of the exclusionary rule is "to deter—to compel respect for the constitutional guaranty . . . by removing the incentive to disregard it"). In *Weeks*, *Silverthorne*, and *Mapp*, the Court based its holdings requiring suppression of unlawfully obtained evidence upon the recognition that admission of that evidence would seriously undermine the Fourth Amendment's promise. All three cases recognized that failure to apply the exclusionary rule would make that promise a hollow one, see *Mapp, supra,* at 657, reducing it to "a form of words," *Silverthorne, supra,* at 392, "of no value" to those whom it seeks to protect, *Weeks, supra,* at 393. Indeed, this Court in *Mapp* held that the exclusionary rule applies to the States in large part due to its belief that alternative state mechanisms for enforcing the Fourth Amendment's guarantees had proved "worthless and futile." 367 U. S., at 652.

Why is application of the exclusionary rule any the less necessary here? Without such a rule, as in *Mapp,* police know that they can ignore the Constitution's requirements without risking suppression of evidence discovered after an unreasonable entry. As in *Mapp,* some government officers will find it easier, or believe it less risky, to proceed with what they consider a necessary search immediately and without the requisite constitutional (say, warrant or knock-and-announce) compliance. Cf. Mericli, The Apprehension of Peril Exception to the Knock and Announce Rule—Part I, 16 Search and Seizure L. Rep. 129, 130 (1989) (hereinafter Mericli) (noting that some "[d]rug enforcement authorities believe that safety for the police lies in a swift, surprising entry with overwhelming force—not in announcing their official authority").

Of course, the State or the Federal Government may provide alternative remedies for knock-and-announce violations. But that circumstance was true of *Mapp* as well. What reason is there to believe that those remedies (such as private damages actions under Rev. Stat. § 1979, 42 U. S. C. § 1983), which the Court found inadequate in *Mapp,* can adequately deter unconstitutional police behavior here? See Kamisar, In Defense of the Search and Seizure Exclusionary Rule, 26 Harv. J. L. & Pub. Pol'y 119, 126–129 (2003) (arguing that "five decades of post-*Weeks* 'freedom' from the inhibiting effect of the federal exclusionary rule failed to produce any meaningful alternative to the exclusionary rule in any jurisdiction" and that there is no evidence that "times have changed" post-*Mapp*).

The cases reporting knock-and-announce violations are legion. See, *e. g.*, 34 Geo. L. J. Ann. Rev. Crim. Proc. 31–35 (2005) (collecting Courts of Appeals cases); Bremer, 85 A. L. R. 5th 1 (2001) (collecting state-court cases); Brief for Petitioner 16–17 (collecting federal and state cases). Indeed, these cases of reported violations seem sufficiently frequent and serious as to indicate "a widespread pattern." *Ante*, at 604 (KENNEDY, J., concurring in part and concurring in judgment). Yet the majority, like Michigan and the United States, has failed to cite a single reported case in which a plaintiff has collected more than nominal damages solely as a result of a knock-and-announce violation. Even Michigan concedes that, "in cases like the present one . . . , damages may be virtually nonexistent." Brief for Respondent 35, n. 66. And Michigan's *amici* further concede that civil immunities prevent tort law from being an effective substitute for the exclusionary rule at this time. Brief for Criminal Justice Legal Foundation 10; see also *Hope* v. *Pelzer*, 536 U. S. 730, 739 (2002) (difficulties of overcoming qualified immunity defenses).

As Justice Stewart, the author of a number of significant Fourth Amendment opinions, explained, the deterrent effect of damages actions "can hardly be said to be great," as such actions are "expensive, time-consuming, not readily available, and rarely successful." The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1388 (1983). The upshot is that the need for deterrence—the critical factor driving this Court's Fourth Amendment cases for close to a century—argues with at least comparable strength for evidentiary exclusion here.

To argue, as the majority does, that new remedies, such as 42 U. S. C. § 1983 actions or better trained police, make suppression unnecessary is to argue that *Wolf,* not *Mapp,* is now the law. (The Court recently rejected a similar argument in *Dickerson* v. *United States,* 530 U. S. 428, 441–442 (2000).) To argue that there may be few civil suits because violations may produce nothing "more than nominal injury" is to confirm, not to deny, the inability of civil suits to deter violations. See *ante,* at 598. And to argue without evidence (and despite myriad reported cases of violations, no reported case of civil damages, and Michigan's concession of their nonexistence) that civil suits may provide deterrence because claims *may* "have been settled" is, perhaps, to search in desperation for an argument. See *ibid.* Rather, the majority, as it candidly admits, has simply "assumed" that, "[a]s far as [it] know[s], civil liability is an effective deterrent," *ibid.,* a support-free assumption that *Mapp* and subsequent cases make clear does not embody the Court's normal approach to difficult questions of Fourth Amendment law.

It is not surprising, then, that after looking at virtually every pertinent Supreme Court case decided since *Weeks,* I can find no precedent that might offer the majority support for its contrary conclusion. The Court has, of course, recognized that not every Fourth Amendment violation necessarily triggers the exclusionary rule. *Ante,* at 590–592; cf. *Illinois* v. *Gates,* 462 U. S. 213, 223 (1983) (application of the exclusionary rule is a separate question from whether the Fourth Amendment has been violated). But the class of Fourth Amendment violations that do not result in suppression of the evidence seized, however, is limited.

The Court has declined to apply the exclusionary rule only:

> (1) where there is a specific reason to believe that application of the rule would "not result in appreciable deterrence," *United States* v. *Janis,* 428 U. S. 433, 454 (1976); see, *e. g., United States* v. *Leon,* 468 U. S. 897, 919–920

> (1984) (exception where searching officer executes defective search warrant in "good faith"); *Arizona* v. *Evans*, 514 U. S. 1, 14 (1995) (exception for clerical errors by court employees); *Walder* v. *United States*, 347 U. S. 62 (1954) (exception for impeachment purposes), or
>
> (2) where admissibility in proceedings other than criminal trials was at issue, see, *e. g., Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 364 (1998) (exception for parole revocation proceedings); *INS* v. *Lopez-Mendoza*, 468 U. S. 1032, 1050 (1984) (plurality opinion) (exception for deportation proceedings); *Janis, supra*, at 458 (exception for civil tax proceedings); *United States* v. *Calandra*, 414 U. S. 338, 348–350 (1974) (exception for grand jury proceedings); *Stone* v. *Powell*, 428 U. S. 465, 493–494 (1976) (exception for federal habeas proceedings).

Neither of these two exceptions applies here. The second does not apply because this case is an ordinary criminal trial. The first does not apply because (1) officers who violate the rule are not acting "as a reasonable officer would and should act in similar circumstances," *Leon, supra*, at 920, (2) this case does not involve government employees other than police, *Evans, supra*, and (3), most importantly, the key rationale for any exception, "lack of deterrence," is missing, see *Pennsylvania Bd. of Probation, supra*, at 364 (noting that the rationale for not applying the rule in noncriminal cases has been that the deterrence achieved by having the rule apply in those contexts is "minimal" *because* "application of the rule in the criminal trial context already provides significant deterrence of unconstitutional searches"); *Michigan* v. *Tucker*, 417 U. S. 433, 447 (1974) (noting that deterrence rationale would not be served if rule applied to police officers acting in good faith, as the "deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct"). That critical latter rationale, which underlies *every* exception, does not apply here, as there is no reason to think that, in the case of knock-and-announce violations by the police, "the exclusion of evidence at trial would not sufficiently deter future errors," *Evans, supra,* at 14, or "'further the ends of the exclusionary rule in any appreciable way,'" *Leon, supra,* at 919–920.

I am aware of no other basis for an exception. The Court has decided more than 300 Fourth Amendment cases since *Weeks.* The Court has found constitutional violations in nearly a third of them. See W. Greenhalgh, The Fourth Amendment Handbook: A Chronological Survey of Supreme Court Decisions 27–130 (2d ed. 2003) (collecting and summarizing 332 post-*Weeks* cases decided between 1914 and 2002). The nature of the constitutional violation varies. In most instances officers lacked a warrant; in others, officers possessed a warrant based on false affidavits; in still others, the officers executed the search in an unconstitutional manner. But in every case involving evidence seized during an illegal search of a home (federally since *Weeks,* nationally since *Mapp*), the Court, with the exceptions mentioned, has either explicitly or implicitly upheld (or required) the suppression of the evidence at trial. See Appendix, *infra.* In not one of those cases did the Court "questio[n], in the absence of a more efficacious sanction, the continued application of the [exclusionary] rule to suppress evidence from the State's case" in a criminal trial. *Franks* v. *Delaware,* 438 U. S. 154, 171 (1978).

I can find nothing persuasive in the majority's opinion that could justify its refusal to apply the rule. It certainly is not a justification for an exception here (as the majority finds) to find odd instances in *other* areas of law that do not automatically demand suppression. *Ante,* at 596–597 (suspect confesses, police beat him up *afterwards;* suspect confesses, *then* police apparently arrest him, take him to station, and refuse to tell him of his right to counsel). Nor can it justify an exception to say that *some* police may knock at the door anyway (to avoid being mistaken for a burglar), for other police (believing quick entry is the most secure, effective entry) will not voluntarily do so. Cf. Mericli 130 (describing Special Weapons and Tactics (SWAT) team practices); R. Balko, No SWAT (Apr. 6, 2006), available at http://www.cato.org/pub_display.php?pub_id=6344 (all Internet materials as visited June 7, 2006, and available in Clerk of Court's case file).

Neither can the majority justify its failure to respect the need for deterrence, as set forth consistently in the Court's prior case law, through its claim of "'substantial social costs'"—at least if it means that those "'social costs'" are somehow special here. *Ante,* at 596. The only costs it mentions are those that typically accompany *any* use of the Fourth Amendment's exclusionary principle: (1) that where the constable blunders, a guilty defendant may be set free (consider *Mapp* itself); (2) that defendants may assert claims where Fourth Amendment rights are uncertain (consider the Court's qualified immunity jurisprudence), and (3) that sometimes it is difficult to decide the merits of those uncertain claims. See *ante,* at 595–596. In fact, the "no-knock" warrants that are provided by many States, by diminishing uncertainty, may make application of the knock-and-announce principle less "'cost[ly]'" on the whole than application of comparable Fourth Amendment principles, such as determining whether a particular warrantless search was justified by exigency. The majority's "substantial social costs" argument is an argument against the Fourth Amendment's exclusionary principle itself. And it is an argument that this Court, until now, has consistently rejected.

## III

The majority, Michigan, and the United States make several additional arguments. In my view, those arguments rest upon misunderstandings of the principles underlying this Court's precedents.

### A

The majority first argues that "the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence." *Ante,* at 592. But taking causation as it is commonly understood in the law, I do not see how that can be so. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 266 (5th ed. 1984). Although the police might have entered Hudson's home lawfully, they did not in fact do so. Their unlawful behavior inseparably characterizes their actual entry; that entry was a necessary condition of their presence in Hudson's home; and their presence in Hudson's home was a necessary condition of their finding and seizing the evidence. At the same time, their discovery of evidence in Hudson's home was a readily foreseeable consequence of their entry and their unlawful presence within the home. Cf. 2 Restatement (Second) of Torts §435 (1963–1964).

Moreover, separating the "manner of entry" from the related search slices the violation too finely. As noted, Part I–A, *supra,* we have described a failure to comply with the knock-and-announce rule, not as an independently unlawful event, but as a factor that renders the *search* "constitutionally defective." *Wilson,* 514 U. S., at 936; see also *id.,* at 934 (compliance with the knock-and-announce requirement is one of the "factors to be considered in assessing the *reasonableness of a search or seizure*" (emphasis added)); *Ker* v. *California,* 374 U. S. 23, 53 (1963) (opinion of Brennan, J.) ("[A] lawful entry is the indispensable predicate of a reasonable search").

The Court nonetheless accepts Michigan's argument that the requisite but-for causation is not satisfied in this case because, whether or not the constitutional violation occurred (what the Court refers to as a "preliminary misstep"), "the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house." *Ante,* at 592. As support for this proposition, Michigan rests on this Court's inevitable discovery cases.

This claim, however, misunderstands the inevitable discovery doctrine. Justice Holmes in *Silverthorne,* in discussing an "independent source" exception, set forth the principles underlying the inevitable discovery rule. See *supra,* at 607. That rule does not refer to discovery that would have taken place if the police behavior in question had (contrary to fact) been lawful. The doctrine does not treat as critical what *hypothetically could* have happened had the police acted lawfully in the first place. Rather, "independent" or "inevitable" discovery refers to discovery that did occur or that would have occurred (1) *despite* (not simply *in the absence of*) the unlawful behavior and (2) *independently* of that unlawful behavior. The government cannot, for example, avoid suppression of evidence seized without a warrant (or pursuant to a defective warrant) simply by showing that it could have obtained a valid warrant had it sought one. See, *e. g., Coolidge* v. *New Hampshire,* 403 U. S. 443, 450–451 (1971). Instead, it must show that the same evidence "inevitably *would* have been discovered *by lawful means.*" *Nix* v. *Williams,* 467 U. S., at 444 (emphasis added). "What a man *could* do is not at all the same as what he *would* do." Austin, Ifs And Cans, 42 Proceedings of the British Academy 109, 111–112 (1956).

The inevitable discovery exception rests upon the principle that the remedial purposes of the exclusionary rule are not served by suppressing evidence discovered through a "later, *lawful* seizure" that is "*genuinely independent* of an earlier, tainted one." *Murray* v. *United States,* 487 U. S. 533, 542 (1988) (emphasis added); see also *id.*, at 545 (Marshall, J., joined by STEVENS and O'Connor, JJ., dissenting) ("When the seizure of the evidence at issue is 'wholly independent of' the constitutional violation, then exclusion arguably will have no effect on a law enforcement officer's incentive to commit an unlawful search").

Case law well illustrates the meaning of this principle. In *Nix, supra,* police officers violated a defendant's Sixth Amendment right by eliciting incriminating statements from him after he invoked his right to counsel. Those statements led to the discovery of the victim's body. The Court concluded that evidence obtained from the victim's body was admissible because it would ultimately or inevitably have been discovered by a volunteer search party effort that was ongoing—whether or not the Sixth Amendment violation had taken place. *Id.,* at 449. In other words, the evidence would have been found *despite,* and *independent of,* the Sixth Amendment violation.

In *Segura* v. *United States,* 468 U. S. 796 (1984), one of the "trio of cases" JUSTICE SCALIA says "confirms [the Court's] conclusion," *ante,* at 599–600 (plurality opinion), the Court held that an earlier illegal entry into an apartment did not require suppression of evidence that police later seized when executing a search warrant obtained on the basis of information unconnected to the initial entry. The Court reasoned that the "evidence was discovered the day following the entry, *during the search conducted under a valid warrant*"—*i. e.,* a warrant obtained independently without use of any information found during the illegal entry—and that "it was the product of *that* search, wholly unrelated to the prior [unlawful] entry." *Segura, supra,* at 814 (emphasis added).

In *Murray, supra,* the Court upheld the admissibility of seized evidence where agents entered a warehouse without a warrant, and then later returned with a valid warrant that was not obtained on the basis of evidence observed during the first (illegal) entry. The Court reasoned that while the agents' "[k]nowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry . . . it was *also* acquired at the time of entry pursuant to the warrant, and *if that later acquisition was not the result of the earlier entry* there is no reason why the independent source doctrine should not apply." *Id.*, at 541 (emphasis added).

Thus, the Court's opinion reflects a misunderstanding of what "inevitable discovery" means when it says, "[i]n this case, of course, the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence." *Ante,* at 592. The majority rests this conclusion on its next statement: "Whether that preliminary misstep had occurred *or not,* the police . . . would have discovered the gun and drugs inside the house." *Ibid.* Despite the phrase "of course," neither of these statements is correct. It is not true that, had the illegal entry not occurred, "police . . . would have discovered the gun and drugs inside the house." Without that unlawful entry they would not have been inside the house; so there would have been no discovery. See *supra,* at 615.

Of course, had the police entered the house lawfully, they would have found the gun and drugs. But that fact is beside the point. The question is not what police might have done had they not behaved unlawfully. The question is what they did do. Was there set in motion an independent chain of events that would have inevitably led to the discovery and seizure of the evidence despite, and independent of, that behavior? The answer here is "no."

## B

The majority, Michigan, and the United States point out that the officers here possessed a warrant authorizing a search. *Ante,* at 592. That fact, they argue, means that the evidence would have been discovered independently or somehow diminishes the need to suppress the evidence. But I do not see why that is so. The warrant in question was not a "no-knock" warrant, which many States (but not Michigan) issue to assure police that a prior knock is not necessary. *Richards,* 520 U. S., at 396, n. 7 (collecting state statutes). It did not authorize a search that fails to comply with knock-

and-announce requirements. Rather, it was an ordinary search warrant. It authorized a search that *complied with*, not a search that *disregarded*, the Constitution's knock-and-announce rule.

Would a warrant that authorizes entry into a home on Tuesday permit the police to enter on Monday? Would a warrant that authorizes entry during the day authorize the police to enter during the middle of the night? It is difficult for me to see how the presence of a warrant that does not authorize the entry in question has anything to do with the "inevitable discovery" exception or otherwise diminishes the need to enforce the knock-and-announce requirement through suppression.

### C

The majority and the United States set forth a policy-related variant of the causal connection theme: The United States argues that the law should suppress evidence only insofar as a Fourth Amendment violation causes the kind of harm that the particular Fourth Amendment rule seeks to protect against. It adds that the constitutional purpose of the knock-and-announce rule is to prevent needless destruction of property (such as breaking down a door) and to avoid unpleasant surprise. And it concludes that the exclusionary rule should suppress evidence of, say, damage to property, the discovery of a defendant in an "intimate or compromising moment," or an excited utterance from the occupant caught by surprise, but nothing more. Brief for United States as *Amicus Curiae* 12, 28.

The majority makes a similar argument. It says that evidence should not be suppressed once the causal connection between unlawful behavior and discovery of the evidence becomes too "attenuated." *Ante*, at 592. But the majority then makes clear that it is not using the word "attenuated" to mean what this Court's precedents have typically used that word to mean, namely, that the discovery of the evidence has come about long after the unlawful behavior took place or in an independent way, *i. e.*, through "'means sufficiently distinguishable to be purged of the primary taint.'" *Wong Sun* v. *United States*, 371 U. S. 471, 487–488 (1963); see *Brown* v. *Illinois*, 422 U. S. 590, 603–604 (1975).

Rather, the majority gives the word "attenuation" a new meaning (thereby, in effect, making the same argument as the United States). "Attenuation," it says, "also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Ante*, at 593. The interests the knock-and-announce rule seeks to protect, the Court adds, are "human life" (at stake when a householder is "surprised"), "property" (such as the front door), and "those elements of privacy and dignity that can be destroyed by a sudden entrance," namely, "the opportunity to collect oneself before answering the door." *Ante*, at 594. Since none of those interests led to the discovery of the evidence seized here, there is no reason to suppress it.

There are three serious problems with this argument. First, it does not fully describe the constitutional values, purposes, and objectives underlying the knock-and-announce requirement. That rule does help to protect homeowners from damaged doors; it does help to protect occupants from surprise. But it does more than that. It protects the occupants' privacy by assuring them that government agents will not enter their home without complying with those requirements (among others) that diminish the offensive nature of any such intrusion. Many years ago, Justice Frankfurter wrote for the Court that the "knock at the door, . . . as a prelude to a search, without authority of law . . . [is] inconsistent with the conception of human rights enshrined in [our] history" and Constitution. *Wolf*, 338 U. S., at 28. How much the more offensive when the search takes place without any knock at all. Cf. *Wilson*, 514 U. S., at 931 (knock-and-announce rule recognizes that "the common law generally protected a man's house as 'his castle of defence and asylum'" (quoting 3 W. Blackstone, Commentaries *288)); *Miller*, 357 U. S., at 313 (federal knock-and-announce statute "codif[ied] a tradition embedded in Anglo-American law" that reflected "the reverence of the law for the individual's right of privacy in his house").

Over a century ago this Court wrote that "[i]t is not the breaking of his doors" that is the "essence of the offence," but the "invasions on the part of the government . . . of the sanctity of a man's home and the privacies of life." *Boyd*, 116 U. S., at 630. And just this Term we have reiterated that "'it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people.'" *Georgia* v. *Randolph*, *ante*, at 115 (quoting *Minnesota* v. *Carter*, 525 U. S. 83, 99 (1998) (KENNEDY, J., concurring)). The knock-and-announce requirement is no less a part of the "centuries-old principle" of special protection for the privacy of the home than the warrant requirement. See *Randolph*, *ante*, at 115 (citing *Miller*, *supra*, at 307). The Court is therefore wrong to reduce the essence of its protection to "the right not to be intruded upon in one's nightclothes." *Ante*, at 597; see *Richards*, 520 U. S., at 393, n. 5 ("[I]ndividual privacy interest[s]" protected by the rule are "not inconsequential" and "should not be unduly minimized").

Second, whether the interests underlying the knock-and-announce rule are implicated in any given case is, in a sense, beside the point. As we have explained, failure to comply with the knock-and-announce rule renders the related search unlawful. *Wilson*, *supra*, at 936. And where a search is unlawful, the law insists upon suppression of the evidence consequently discovered, even if that evidence or its possession has little or nothing to do with the reasons underlying the unconstitutionality of a search. The Fourth Amendment does not seek to protect contraband, yet we have required suppression of contraband seized in an unlawful search. See, *e. g.*, *Kyllo* v. *United States*, 533 U. S. 27, 40 (2001); *Coo-*

*lidge*, 403 U. S., at 473. That is because the exclusionary rule protects more general "privacy values through deterrence of future police misconduct." *James* v. *Illinois*, 493 U. S. 307, 319 (1990). The same is true here.

Third, the majority's interest-based approach departs from prior law. Ordinarily a court will simply look to see if the unconstitutional search produced the evidence. The majority does not refer to any relevant case in which, beyond that, suppression turned on the far more detailed relation between, say, (1) a particular materially false statement made to the magistrate who issued a (consequently) invalid warrant and (2) evidence found after a search with that warrant. But cf. *ante*, at 601–602, n. 2 (plurality opinion) (citing *New York* v. *Harris*, 495 U. S. 14 (1990), as such a case in section of opinion that JUSTICE KENNEDY does not join). And the majority's failure does not surprise me, for such efforts to trace causal connections at retail could well complicate Fourth Amendment suppression law, threatening its workability.

### D

The United States, in its brief and at oral argument, has argued that suppression is "an especially harsh remedy given the nature of the violation in this case." Brief as *Amicus Curiae* 28; see also *id.*, at 24. This argument focuses upon the fact that entering a house after knocking and announcing can, in some cases, prove dangerous to a police officer. Perhaps someone inside has a gun, as turned out to be the case here. The majority adds that police officers about to encounter someone who may try to harm them will be "uncertain" as to how long to wait. *Ante*, at 595. It says that, "[i]f the consequences of running afoul" of the knock-and-announce "rule were so massive," *i. e.*, would lead to the exclusion of evidence, then "officers would be inclined to wait longer than the law requires—producing preventable violence against officers in some cases." *Ibid.*

To argue that police efforts to assure compliance with the rule may prove dangerous, however, is not to argue against evidence suppression. It is to argue against the validity of the rule itself. Similarly, to argue that enforcement means uncertainty, which in turn means the potential for dangerous and longer-than-necessary delay, is (if true) to argue against meaningful compliance with the rule.

The answer to the first argument is that the rule itself does not require police to knock or to announce their presence where police have a "reasonable suspicion" that doing so "would be dangerous or futile" or "would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards, supra,* at 394; see *Banks,* 540 U. S., at 36–37; *Wilson,* 514 U. S., at 935–936.

The answer to the second argument is that States can, and many do, reduce police uncertainty while assuring a neutral evaluation of concerns about risks to officers or the destruction of evidence by permitting police to obtain a "no-knock" search warrant from a magistrate judge, thereby assuring police that a prior announcement is not necessary. *Richards,* 520 U. S., at 396, n. 7 (collecting state statutes). While such a procedure cannot remove all uncertainty, it does provide an easy way for officers to comply with the knock-and-announce rule.

Of course, even without such a warrant, police maintain the backup "authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant is being executed." *Ibid.* "[I]f circumstances support a reasonable suspicion of exigency when the officers arrive at the door, they may go straight in." *Banks, supra,* at 37. And "[r]easonable suspicion is a less demanding standard than probable cause . . . ." *Alabama* v. *White,* 496 U. S. 325, 330 (1990); see *Terry* v. *Ohio,* 392 U. S. 1, 21–22 (1968) (no Fourth Amendment violation under the reasonable suspicion standard if "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate").

Consider this very case. The police obtained a search warrant that authorized a search, not only for drugs, but also for *guns.* App. 5. If probable cause justified a search for guns, why would it not also have justified a no-knock warrant, thereby diminishing any danger to the officers? Why (in a State such as Michigan that lacks no-knock warrants) would it not have justified the very no-knock entry at issue here? Indeed, why did the prosecutor not argue in this very case that, given the likelihood of guns, the no-knock entry was lawful? From what I have seen in the record, he would have won. And had he won, there would have been no suppression here.

That is the right way to win. The very process of arguing the merits of the violation would help to clarify the contours of the knock-and-announce rule, contours that the majority believes are too fuzzy. That procedural fact, along with no-knock warrants, back up authority to enter without knocking regardless, and use of the "reasonable suspicion" standard for doing so should resolve the government's problems with the knock-and-announce rule while reducing the "uncertain[ty]" that the majority discusses to levels beneath that found elsewhere in Fourth Amendment law (*e. g.,* exigent circumstances). *Ante,* at 595. Regardless, if the Court fears that effective enforcement of a constitutional requirement will have harmful consequences, it should face those fears directly by addressing the requirement itself. It should not argue, "the requirement is fine, indeed, a serious matter, just don't enforce it."

### E

It should be apparent by now that the three cases upon which JUSTICE SCALIA relies—*Segura* v. *United States,* 468 U. S. 796; *New York* v. *Harris,* 495 U. S. 14; and *Ramirez,* 523 U. S. 65—do not support his conclusion. See *ante,* at 599–602. Indeed, JUSTICE KENNEDY declines to join this section of the lead opinion because he fails to see the relevance of *Segura* and *Harris,* though he does rely on *Ramirez. Ante,* at 604 (opinion concurring in part and concurring in judgment).

JUSTICE SCALIA first argues that, if the "search in *Segura* could be 'wholly unrelated to the prior entry,' . . . when the only entry was warrantless, it would be bizarre to treat more harshly the actions in this case, where the only entry was *with* a warrant." *Ante*, at 600. Then he says that, "[i]f the probable cause backing a warrant that was issued *later in time* could be an 'independent source' for a search that proceeded after the officers illegally entered and waited, a search warrant obtained *before* going in must have at least this much effect." *Ante*, at 600–601. I do not understand these arguments. As I have explained, the presence of a warrant that did not authorize a search that fails to comply with knock-and-announce requirements is beside the point. See Part III–B, *supra*. And the timing of the warrant in *Segura* made no difference to the case. The relevant fact about the warrant there was that it was lawfully obtained and arguably set off an independent chain of events that led the police to seize the evidence. 468 U. S., at 814; see also *ibid.* ("The valid warrant search was a 'means sufficiently distinguishable' to purge the evidence of any 'taint' arising from the entry"). As noted, there is no such independent event, or intervening chain of events that would purge the taint of the illegal entry, present here. See *supra*, at 618. The search that produced the relevant evidence here is the very search that the knock-and-announce violation rendered unlawful. There simply is no "independent source."

As importantly, the Court in *Segura* said nothing to suggest it intended to create a major exclusionary rule exception, notwithstanding the impact of such an exception on deterrence. Indeed, such an exception would be inconsistent with a critical rationale underlying the independent source and inevitable discovery rules, which was arguably available in *Segura*, and which is clearly absent here. That rationale concerns deterrence. The threat of inadmissibility deters unlawful police behavior; and the existence of an exception applicable where evidence is found through an untainted independent route will rarely undercut that deterrence. That is because the police can rarely rely upon such an exception—at least not often enough to change the deterrence calculus. See *Murray,* 487 U. S., at 540 ("We see the incentives differently. An officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises . . . "); *Nix,* 467 U. S., at 445 ("A police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered"); *id.,* at 444 ("If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence rationale has so little basis that the evidence should be received").

*Segura*'s police officers would have been foolish to have entered the apartment unlawfully with the *ex ante* hope that an independent causal chain of events would later occur and render admissible the evidence they found. By way of contrast, today's holding will seriously undermine deterrence in knock-and-announce cases. Officers will almost always know *ex ante* that they can ignore the knock-and-announce requirement without risking the suppression of evidence discovered after their unlawful entry. That fact is obvious, and this Court has never before today—not in *Segura* or any other post-*Weeks* (or post-*Mapp*) case—refused to apply the exclusionary rule where its absence would so clearly and so significantly impair government officials' incentive to comply with comparable Fourth Amendment requirements.

Neither does *New York* v. *Harris, supra,* support the Court's result. See *ante,* at 593, 601; but see *ante,* at 604 (opinion of KENNEDY, J.) (declining to join section relying on *Harris*). In *Harris,* police officers arrested the defendant at his home without a warrant, in violation of *Payton* v. *New York,* 445 U. S. 573 (1980). Harris made several incriminating statements: a confession in his home, a written inculpatory statement at the station house, and a videotaped interview conducted by the district attorney at the station house. 495 U. S., at 16. The trial court suppressed the statements given by Harris in the house and on the videotape, and the State did not challenge either of those rulings. *Ibid.* The sole question in the case was whether the written statement given later at the station house should also have been suppressed. The Court held that this later, outside-the-home statement "was admissible because Harris was in legal custody . . . and because the statement, while the product of an arrest and being in custody, was not the fruit of the fact that the arrest was made in the house rather than someplace else." *Id.*, at 20. Immediately after the Court stated its holding, it explained:

> "To put the matter another way, suppressing the statement taken outside the house would not serve the purpose of the rule that made Harris' in-house arrest illegal. The warrant requirement for an arrest in the home *is imposed to protect the home, and anything incriminating the police gathered from arresting Harris in his home, rather than elsewhere, has been excluded, as it should have been;* the purpose of the rule has thereby been vindicated." *Ibid.* (emphasis added).

How can JUSTICE SCALIA maintain that the evidence here—a gun and drugs seized in the home—is " 'not the fruit' " of the illegal entry? *Ante*, at 601. The officers' failure to knock and announce rendered the entire search unlawful, *Wilson*, 514 U. S., at 936, and that unlawful search led to the discovery of evidence in petitioner's home. Thus, *Harris* compels the opposite result than that reached by the Court today. Like the *Payton* rule at issue in *Harris*, the knock-and-announce rule reflects the "reverence of the law for the individual's right of privacy in his house." *Miller*, 357 U. S., at 313; cf. *Harris*, 495 U. S., at 17 ("*Payton* itself emphasized that our holding in that case stemmed from the 'overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic'"). Like the confession that was "excluded, as it should have been," in *Harris, id.*, at 20, the evidence in this case was seized in the home, immediately following the illegal entry. And like *Harris,* nothing in petitioner's argument would require the suppression of evidence obtained *outside* the home following a knock-and-announce violation, precisely because officers have a remaining incentive to follow the rule to avoid the suppression of any evidence obtained from the very place they are searching. Cf. *ibid.* ("Even though we decline to suppress statements made outside the home following a *Payton* violation, the principal incentive to obey *Payton* still obtains: the police know that a warrantless entry will lead to the suppression of any evidence found, or statements taken, inside the home").

I concede that *United States* v. *Ramirez,* 523 U. S. 65, offers the plurality its last best hope. *Ante,* at 602. But not even that case can offer the plurality significant support. The plurality focuses on the Court's isolated statement that "destruction of property in the course of a search may violate the Fourth Amendment, *even though the entry itself is lawful and the fruits of the search are not subject to suppression.*" *Ramirez, supra,* at 71 (emphasis added). But even if I accept this dictum, the entry here is unlawful, not lawful. *Wilson, supra,* at 931, 934. It is one thing to say (in an appropriate case) that destruction of property after proper entry has nothing to do with discovery of the evidence, and to refuse to suppress. It would be quite another thing to say that improper entry had nothing to do with discovery of the evidence in this case. Moreover, the deterrence analysis for the property destruction cases (where, by definition, there will almost always be quantifiable damages) might well differ.

## IV

There is perhaps one additional argument implicit in the majority's approach. The majority says, for example, that the "cost" to a defendant of "entering this lottery," *i. e.*, of claiming a "knock-and-announce" violation, "would be small, but the jackpot enormous"—namely, a potential "get-out-of-jail-free card." *Ante*, at 595. It adds that the "social costs" of applying the exclusionary rule here are not worth the deterrence benefits. *Ante*, at 599. Leaving aside what I believe are invalid arguments based on precedent or the majority's own estimate that suppression is not necessary to deter constitutional violations, one is left with a simple unvarnished conclusion, namely, that in this kind of case, a knock-and-announce case, "[r]esort to the massive remedy of suppressing evidence of guilt is unjustified." *Ibid.* Why is that judicial judgment, taken on its own, inappropriate? Could it not be argued that the knock-and-announce rule, a subsidiary Fourth Amendment rule, is simply not important enough to warrant a suppression remedy? Could the majority not simply claim that the suppression game is not worth the candle?

The answer, I believe, is "no." That "no" reflects history, a history that shows the knock-and-announce rule is important. See *Wilson*, *supra*, at 931–936. That "no" reflects precedent, precedent that shows there is no pre-existing legal category of exceptions to the exclusionary rule into which the knock-and-announce cases might fit. See *supra*, at 612–613. That "no" reflects empirical fact, experience that provides confirmation of what common sense suggests: without suppression there is little to deter knock-and-announce violations. See *supra*, at 608–610.

There may be instances in the law where text or history or tradition leaves room for a judicial decision that rests upon little more than an unvarnished judicial instinct. But this is not one of them. Rather, our Fourth Amendment traditions place high value upon protecting privacy in the home. They emphasize the need to assure that its constitutional protections are effective, lest the Amendment "sound the word of promise to the ear but break it to the hope." They include an exclusionary principle, which since *Weeks* has formed the centerpiece of the criminal law's effort to ensure the practical reality of those promises. That is why the Court should assure itself that any departure from that principle is firmly grounded in logic, in history, in precedent, and in empirical fact. It has not done so. That is why, with respect, I dissent.

## APPENDIX TO OPINION OF BREYER, J.

Fourth Amendment decisions from 1914 to present requiring suppression of evidence seized (or remanding for lower court to make suppression determination) in a private home following an illegal arrest or search:

1. *Weeks* v. *United States,* 232 U. S. 383 (1914) (warrantless search)
2. *Amos* v. *United States,* 255 U. S. 313 (1921) (warrantless arrest and search)
3. *Agnello* v. *United States,* 269 U. S. 20 (1925) (warrantless search)
4. *Byars* v. *United States,* 273 U. S. 28 (1927) (invalid warrant)
5. *United States* v. *Berkeness,* 275 U. S. 149 (1927) (invalid warrant; insufficient affidavit)
6. *Taylor* v. *United States,* 286 U. S. 1 (1932) (warrantless search)
7. *Grau* v. *United States,* 287 U. S. 124 (1932) (invalid warrant; insufficient affidavit)
8. *Nathanson* v. *United States,* 290 U. S. 41 (1933) (invalid warrant; insufficient affidavit)
9. *McDonald* v. *United States,* 335 U. S. 451 (1948) (warrantless arrest and search)
10. *Kremen* v. *United States,* 353 U. S. 346 (1957) *(per curiam)* (warrantless search)

11. *Elkins* v. *United States,* 364 U. S. 206 (1960) (search beyond scope of warrant)
12. *Silverman* v. *United States,* 365 U. S. 505 (1961) (warrantless use of electronic device)
13. *Chapman* v. *United States,* 365 U. S. 610 (1961) (warrantless search)
14. *Mapp* v. *Ohio,* 367 U. S. 643 (1961) (warrantless search)
15. *Wong Sun* v. *United States,* 371 U. S. 471 (1963) (warrantless search and arrest)
16. *Fahy* v. *Connecticut,* 375 U. S. 85 (1963) (warrantless search)
17. *Aguilar* v. *Texas,* 378 U. S. 108 (1964) (invalid warrant; insufficient affidavit)
18. *Stanford* v. *Texas,* 379 U. S. 476 (1965) (invalid warrant; particularity defect)
19. *James* v. *Louisiana,* 382 U. S. 36 (1965) *(per curiam)* (warrantless search)
20. *Riggan* v. *Virginia,* 384 U. S. 152 (1966) *(per curiam)* (invalid warrant; insufficient affidavit)
21. *Bumper* v. *North Carolina,* 391 U. S. 543 (1968) (lack of valid consent to search)
22. *Recznik* v. *City of Lorain,* 393 U. S. 166 (1968) *(per curiam)* (warrantless search)
23. *Chimel* v. *California,* 395 U. S. 752 (1969) (invalid search incident to arrest)
24. *Von Cleef* v. *New Jersey,* 395 U. S. 814 (1969) *(per curiam)* (invalid search incident to arrest)
25. *Shipley* v. *California,* 395 U. S. 818 (1969) *(per curiam)* (invalid search incident to arrest)
26. *Vale* v. *Louisiana,* 399 U. S. 30 (1970) (invalid search incident to arrest)
27. *Connally* v. *Georgia,* 429 U. S. 245 (1977) *(per curiam)* (invalid warrant; magistrate judge not neutral)

28. *Michigan* v. *Tyler,* 436 U. S. 499 (1978) (warrantless search)
29. *Mincey* v. *Arizona,* 437 U. S. 385 (1978) (warrantless search)
30. *Franks* v. *Delaware,* 438 U. S. 154 (1978) (invalid warrant; obtained through perjury)
31. *Payton* v. *New York,* 445 U. S. 573 (1980) (warrantless arrest)
32. *Steagald* v. *United States,* 451 U. S. 204 (1981) (warrantless search)
33. *Michigan* v. *Clifford,* 464 U. S. 287 (1984) (warrantless search)
34. *Welsh* v. *Wisconsin,* 466 U. S. 740 (1984) (warrantless entry into home without exigent circumstances)
35. *Thompson* v. *Louisiana,* 469 U. S. 17 (1984) *(per curiam)* (warrantless search)
36. *Arizona* v. *Hicks,* 480 U. S. 321 (1987) (unreasonable search)
37. *Minnesota* v. *Olson,* 495 U. S. 91 (1990) (warrantless entry into home)
38. *Flippo* v. *West Virginia,* 528 U. S. 11 (1999) *(per curiam)* (warrantless search)
39. *Kyllo* v. *United States,* 533 U. S. 27 (2001) (warrantless use of heat-imaging technology)
40. *Kirk* v. *Louisiana,* 536 U. S. 635 (2002) *(per curiam)* (warrantless arrest and search)
41. *Kaupp* v. *Texas,* 538 U. S. 626 (2003) *(per curiam)* (warrantless search)

# KIRCHER ET AL. *v.* PUTNAM FUNDS TRUST ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 05–409. Argued April 24, 2006—Decided June 15, 2006

The Securities Litigation Uniform Standards Act of 1998 (Act) specifies that private state-law "covered" class actions alleging untruth or manipulation "in connection with the purchase or sale" of a "covered" security may not "be maintained in any State or Federal court," 15 U. S. C. § 77p(b), and authorizes removal to federal district court of "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b)," § 77p(c). "A 'covered class action' is a lawsuit in which damages are sought on behalf of more than 50 people. A 'covered security' is one traded nationally and listed on a regulated national exchange." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit, ante,* at 83.

Petitioners, mutual fund investors, filed separate state-court actions, each seeking to assert state-law claims on behalf of a class of investors allegedly injured by devaluation of their holdings by respondent mutual funds. The funds filed notices of removal in each case stating, among other things, that the actions were removable under and precluded by the Act. Once removed, however, the Federal District Court remanded each case to state court on the ground that it lacked subject-matter jurisdiction on removal because the Act did not preclude the investors' claims. Since they were said to have been injured as "holders" of mutual fund shares, not purchasers or sellers, the court reasoned, their claims did not satisfy § 77p(b)'s "in connection with the purchase or sale" requirement, and the claims could therefore proceed in state court. The Seventh Circuit acknowledged that 28 U. S. C. § 1447(d) bars review of district court orders remanding removed cases for lack of subject-matter jurisdiction, but decided that the District Court had the last word neither on the characterization of its decision as jurisdictional nor on the correctness of its conclusion that remand was required. The appeals court considered all covered class actions involving covered securities, whether precluded or not, to be removable under the Act, and therefore thought the preclusion issue distinct from the jurisdictional issue whether the case belonged in federal court at all. It held that orders remanding "properly removed" suits as not precluded are substantive and unaffected by § 1447(d), and therefore reviewable. Proposing that the Act reserves to the Federal Judiciary the exclusive authority to make the preclusion decision, the court said that treating remand orders in this context as immunized from appeal by § 1447(d) would mean that a major substantive issue would escape review, since it would not be open to resolution in the state court subject to review by this Court. The Seventh Circuit subsequently consolidated the funds' appeals and decided, on the merits, that the Act precludes the investors' claims.

*Held:* Orders remanding for want of preclusion under the Act are subject to § 1447(d) and its general rule of nonappealability. Pp. 640–648.

(a) Section 1447(d), which states that an "order remanding a case to the State court from which it was removed is not reviewable on appeal," applies to all remands based on the grounds specified in § 1447(c), including lack of subject-matter jurisdiction. *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336, 343–345. It applies equally to cases removed under the general removal statute, § 1441, and to those removed under other provisions, see *Things Remembered, Inc.* v. *Petrarca,* 516 U. S. 124, 128, and its force is not subject to any statutory exception that might cover this case. The District Court said that it was remanding for lack of jurisdiction, an unreviewable ground. Where a remand order is based on one of § 1447(c)'s grounds, review is unavailable no matter how plain the legal error in ordering the remand. *Briscoe* v. *Bell,* 432 U. S. 404, 413, n. 13. The Seventh Circuit did not overlook cases like *Briscoe,* but relied instead on cases such as *Kontrick* v. *Ryan,* 540 U. S. 443, which observed that some rulings loosely called jurisdictional are patently not jurisdictional in the strict sense. Viewing this as such a case, the appeals court understood the District Court's preclusion decision to be substantive, not jurisdictional, and consequently subject to review. But the District Court was correct in understanding its remand order to be dictated by a finding that it lacked removal jurisdiction. Section 77p(c)'s authorization for removal, on which district-court jurisdiction depends, is confined to cases "set forth in subsection (b)," *i. e.,* those with claims of untruth or manipulation. That phrase immediately follows the § 77p(c) language describing removable cases as covered class actions involving covered securities, and the language has no apparent function unless it limits removal to covered class actions involving claims like untruth or deception. Legislative history tends to show that this was just what Congress understood. The preclusion determination is jurisdictional, as is the order implementing it. Pp. 640–644.

(b) The Seventh Circuit's reading was in part motivated by the court's erroneous assumption that the Act gives federal courts exclusive jurisdiction to decide the preclusion issue. A covered action is removable if it is precluded, and a defendant can enlist the Federal Judiciary to decide preclusion, but he can elect to leave the case where the plaintiff filed it and trust the state court to make the preclusion determination. What a state court could do in the first place it may also do on remand; here, the funds can ask for dismissal on preclusion grounds when they return to state court. Collateral estoppel should be no bar to such a revisitation, given that § 1447(d) prevents the funds from appealing the District Court's decision. While the state court cannot review the decision to remand in an appellate way, it is free to reject the remanding court's reasoning. *Missouri Pacific R. Co.* v. *Fitzgerald,* 160 U. S. 556, 583. There is no reason to doubt that the state court in this litigation will duly apply *Dabit*'s holding that holder claims are embraced by § 77p(b), but this Court can review any claim of error on that point. Pp. 645–648.

403 F. 3d 478, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined, and in which SCALIA, J., joined as to Parts I, III, and IV. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 648.

*David C. Frederick* argued the cause for petitioners. With him on the briefs were *Scott K. Attaway, Robert L. King,* and *Klint L. Bruno.*

*Mark A. Perry* argued the cause for respondents. With him on the brief were *Miguel A. Estrada, Amanda M. Rose, John D. Donovan, Jr., Thomas B. Smith, Steven B. Feirson, Stephen J. McConnell, Nory Miller, Christopher P. Hall, Todd D. Brody, Dale R. Harris, Phil C. Neal, Mark A. Rabinowitz, John W. Rotunno, Kenneth E. Rechtoris, James R. Carroll, David S. Clancy, Charles F. Smith, Lee P. Garner,* and *Robert Y. Sperling.*[*]

JUSTICE SOUTER delivered the opinion of the Court.

Title 28 U. S. C. § 1447(d) limits appellate review of a district court order remanding a case from federal to state court. The question here is whether an order remanding a case removed under the Securities Litigation Uniform Standards Act of 1998 is appealable, notwithstanding § 1447(d). We hold it is not.

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[*] Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States of America by *Charles A. Rothfeld, Robin S. Conrad,* and *Amar D. Sarwal;* for the Securities Industry Association et al. by *Carter G. Phillips* and *Richard D. Bernstein;* and for the Washington Legal Foundation by *W. Reece Bader, James A. Meyers, Michael C. Tu,* and *Daniel J. Popeo.*

*Brian Wolfman* and *Arthur R. Miller* filed a brief for Law Professors et al. as *amici curiae.*

## I

The Private Securities Litigation Reform Act of 1995 (Reform Act), 109 Stat. 737, targeted "perceived abuses of the class-action vehicle in litigation involving nationally traded securities," *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit, ante,* at 81, and put limits on federal securities class actions. But Congress soon discovered that "[r]ather than face the obstacles set in their path by the Reform Act, plaintiffs and their representatives [were] bringing class actions under state law, often in state court," *ante,* at 82. To block this bypass of the Reform Act, Congress enacted the Securities Litigation Uniform Standards Act of 1998 (Act), 112 Stat. 3227; see *Dabit, ante,* at 81–82.

The Act has a preclusion provision[1] and a removal provision:[2] it provides that private state-law "covered" class actions alleging untruth or manipulation in connection with the purchase or sale of a "covered" security may not "be maintained in any State or Federal court," 112 Stat. 3228 (codified at 15 U. S. C. § 77p(b)),[3] and it authorizes removal to federal district court of "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b)," 112 Stat. 3228 (codified at § 77p(c)). "A 'covered class action' is a lawsuit in which damages are sought on behalf of more than 50 people. A 'covered security' is one traded nationally and listed on a regulated national exchange." *Dabit, ante,* at 83 (footnotes omitted).

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[1] "No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

"(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

"(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 112 Stat. 3228 (codified at 15 U. S. C. § 77p(b)).

The preclusion provision is often called a preemption provision; the Act, however, does not itself displace state law with federal law but makes some state-law claims nonactionable through the class-action device in federal as well as state court. See *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit, ante,* at 87 ("The Act does not deny any individual plaintiff, or indeed any group of fewer than 50 plaintiffs, the right to enforce any state-law cause of action that may exist").

[2] "Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section." 112 Stat. 3228 (codified at 15 U. S. C. § 77p(c)).

Petitioners are eight groups of investors holding mutual fund shares, who filed separate actions in Illinois state courts, each group seeking to represent a class of investors allegedly injured by devaluation of their holdings by respondents (mutual funds, investment advisors, and an insurance company) (hereinafter collectively the funds).[4] The eight complaints asserted only state-law claims, such as negligence and breach of fiduciary duty.

The funds filed notices of removal to federal district court in each case stating, among other things, that the actions were removable under and precluded by the Act. Once in the District Court, however, the investors argued that the cases should be remanded for lack of subject-matter jurisdiction, and in separate orders the District Court for the Southern District of Illinois remanded each case to state court on the ground that the District Court lacked subject-matter jurisdiction on removal because the Act did not preclude the investors' claims. Since the investors were said to have been injured as "holders" of mutual fund shares, not purchasers or sellers, the District Court reasoned, their claims did not satisfy the "in connection with the purchase or sale" requirement of the Act's preclusion provision, § 77p(b),[5] and the claims could therefore proceed in state court. The District Court did not decide whether the claims otherwise met the Act's conditions for preclusion.

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[3] The Act amends "in substantially identical ways," *Dabit, ante,* at 82, n. 6, both the Securities Act of 1933, 48 Stat. 74, and the Securities Exchange Act of 1934, 48 Stat. 881. For the sake of simplicity, the Seventh Circuit relied exclusively on the amendments to the Securities Act of 1933, and for ease of reference we will do the same.

[4] The investors claim that the funds facilitated the practice of "market timing," whereby traders of mutual fund shares exploit brief discrepancies between the stock prices used to calculate the shares' value once a day, and the prices at which those stocks are actually trading in the interim. Brief for Petitioners 6. The investors say that market timing is harmful to long-term holders of mutual fund shares and that the funds negligently or recklessly failed to adopt procedures to protect the value of the investors' long-term investments.

The funds filed notices of appeal from the remand orders, and in one of the cases, 373 F. 3d 847 (2004), the Seventh Circuit issued an opinion addressing the threshold question of its appellate jurisdiction. The Court of Appeals acknowledged that 28 U. S. C. § 1447(d) bars review of district court orders remanding for lack of subject-matter jurisdiction, 373 F. 3d, at 849 (citing *Gravitt* v. *Southwestern Bell Telephone Co.*, 430 U. S. 723 (1977) *(per curiam)*), but decided that the District Court had the last word neither on the characterization of its decision as jurisdictional nor on the correctness of its conclusion that remand was required, see 373 F. 3d, at 849.

The Court of Appeals considered all covered class actions involving covered securities, whether precluded or not, to be removable under the Act, and for that reason thought the preclusion issue to be distinct from the jurisdictional issue of whether the case belonged in federal court at all. *Id.*, at 849–850. In the view of the Court of Appeals, if the District Court remanded because, for example, the class comprised too few investors to make the case a covered class action, that would be a jurisdictional decision that the case had been removed improperly, and the order would therefore be unreviewable in accordance with § 1447(d). *Id.*, at 849. But the court held that orders remanding "properly removed" suits as not precluded by the Act are substantive, "unaffected by § 1447(d)," *id.*, at 851, and therefore subject to appellate jurisdiction in the normal course.

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[5] As discussed in Part III, *infra*, we have since rejected this reasoning, see *Dabit*, *ante*, at 88–89.

As the Court of Appeals put it, once the District Court had made that substantive decision of no preclusion in this case, it was time for the court to bow out, not because it had lacked "adjudicatory competence" to begin with but because it had completed its work: "Once a court does all that the statute authorizes, there is no adjudicatory competence to do more. That is not the 'lack of subject-matter jurisdiction' that authorizes a remand. Otherwise every federal suit, having been decided on the merits, would be dismissed 'for lack of jurisdiction' because the court's job was finished." *Id.*, at 850. This remand, the court concluded, was therefore not for want of jurisdiction, and review was not barred by § 1447(d).

To satisfy itself that its decision made "practical sense," the court proposed that the Act reserves to the Federal Judiciary the exclusive authority to make the preclusion decision. *Ibid.* Treating remand orders in this context as immunized from appeal by § 1447(d) would thus mean that "a major substantive issue in the case [would] escape review," since it would not be open to resolution in the state court subject to review by this Court. *Ibid.*

The Seventh Circuit subsequently consolidated the funds' appeals and decided, on the merits, that the Act does preclude the investors' claims. 403 F. 3d 478 (2005). We granted certiorari to resolve a split of authority on the question whether § 1447(d) bars review of remand orders in cases removed under the Act,[6] 546 U. S. 1085 (2006), and we now vacate for want of jurisdiction on the part of the Court of Appeals.

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[6] Compare 373 F. 3d 847 (CA7 2004) (case below) with *Spielman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F. 3d 116 (CA2 2003); *Abada* v. *Charles Schwab & Co.*, 300 F. 3d 1112 (CA9 2002); *Williams* v. *AFC Enterprises, Inc.*, 389 F. 3d 1185 (CA11 2004).

## II

The policy of Congress opposes "interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed," *United States* v. *Rice,* 327 U. S. 742, 751 (1946), and nearly three years of jurisdictional advocacy in the cases before us confirm the congressional wisdom. For over a century now, statutes have accordingly limited the power of federal appellate courts to review orders remanding cases removed by defendants from state to federal court, see *id.,* at 748–752; *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336, 346–348 (1976). The current incarnation is 28 U. S. C. § 1447(d), which provides that an "order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."[7] In *Thermtron,* we held that the bar of § 1447(d) applies only to remands based on the grounds specified in § 1447(c), that is, a defect in removal procedure or lack of subject-matter jurisdiction. 423 U. S., at 343–345; see also *Things Remembered, Inc.* v. *Petrarca,* 516 U. S. 124, 127–128 (1995). So, we have approved appellate review of a remand expressly based on the District Court's crowded docket, see *Thermtron, supra,* at 340–341, and one based on abstention under *Burford* v. *Sun Oil Co.,* 319 U. S. 315 (1943), see *Quackenbush* v. *Allstate Ins. Co.,* 517 U. S. 706, 710–712 (1996). But we have relentlessly repeated that "any remand order issued on the grounds specified in § 1447(c) [is immunized from all forms of appellate review], whether or not that order might be deemed erroneous by an appellate court." *Thermtron,* 423 U. S., at 351; see also *id.,* at 343 ("If a trial judge purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeals" (quoting § 1447(c) (1970 ed.))).

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[7] Title 28 U. S. C. § 1447(d) specifically excepts certain civil rights actions from its bar; cf. § 1443.

The bar of § 1447(d) applies equally to cases removed under the general removal statute, § 1441, and to those removed under other provisions, see *Things Remembered, supra,* at 128, and the force of the bar is not subject to any statutory exception that might cover this case.[8] Ostensibly, then, § 1447(d) stands in the way of reviewing the District Court's orders of remand in the present cases. The District Court said that it was remanding for lack of jurisdiction, an unreviewable ground, and even if it is permissible to look beyond the court's own label, the orders are unmistakably premised on the view that removal jurisdiction under 15 U. S. C. § 77p(c) is limited to cases precluded by § 77p(b); on the District Court's understanding that "holder" claims are not subject to preclusion under § 77p(b), the court had no subject-matter jurisdiction.[9] Since there was no indication that removal jurisdiction might exist on some ground other than § 77p(c) (complete diversity, for example),[10] the remand orders were necessarily based on the trial court's conclusion that jurisdiction under § 77p(c) was wanting. And "[w]here the order is based on one of the [grounds enumerated in 28 U. S. C. § 1447(c)], review is unavailable no matter how plain the legal error in ordering the remand," *Briscoe* v. *Bell*, 432 U. S. 404, 413–414, n. 13 (1977).

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[8] "Absent a clear statutory command to the contrary, we assume that Congress is aware of the universality of th[e] practice of denying appellate review of remand orders when Congress creates a new ground for removal," *Things Remembered,* 516 U. S., at 128 (internal quotation marks omitted), like 15 U. S. C. § 77p(c). Congress has, when it wished, expressly made 28 U. S. C. § 1447(d) inapplicable to particular remand orders. See, *e. g.,* § 1447(d); 12 U. S. C. § 1441a(*l*)(3)(C); § 1819(b)(2)(C); 25 U. S. C. § 487(d); cf. n. 7, *supra.* There is no such "clear statutory command" here, and that silence tells us we must look to 28 U. S. C. § 1447(d) to determine the reviewability of remand orders under the Act.

[9] We take a pass on JUSTICE SCALIA's position that we may not look beyond the label, see *post,* at 650 (opinion concurring in part and concurring in judgment); the result here is the same whether we look near or far.

[10] These cases raise exclusively state-law claims seeking damages insufficient to satisfy the amount-in-controversy requirement of 28 U. S. C. § 1332; in those instances in which the funds asserted diversity as a basis for subject-matter jurisdiction, the District Court determined that no named plaintiff had a claim that met § 1332's $75,000 threshold. See, *e. g., Parthasarthy* v. *T. Rowe Price Int'l Funds, Inc.,* No. 03–CV–0673–DRH

The Court of Appeals did not, of course, overlook the cases holding that even a remand premised on an erroneous conclusion of no jurisdiction is unappealable; it relied instead on cases like *Kontrick* v. *Ryan*, 540 U. S. 443 (2004), and *Scarborough* v. *Principi*, 541 U. S. 401 (2004), which observed that some rulings loosely called jurisdictional are patently not jurisdictional in the strict sense, see 373 F. 3d, at 849 (citing *Kontrick, supra; Scarborough, supra*). The appeals court saw this as such a case; it understood that a district court had removal jurisdiction over any covered action under subsection (c), with the consequence that a subsequent order dismissing because of preclusion under subsection (b), or remanding because the action was not precluded, rested simply on an application of substantive law under subsection (b), law that was not jurisdictional at all.

We think, however, that the District Court was correct in understanding its remand order to be dictated by its finding that it lacked removal jurisdiction. Unlike the Court of Appeals, we read authorization for the removal in subsection (c), on which the District Court's jurisdiction depends, as confined to cases "set forth in subsection (b)," § 77p(c), namely, those with claims of untruth, manipulation, and so on. The quoted phrase immediately follows the subsection (c) language describing removable cases as covered class actions involving covered securities, and the language has no apparent function unless it limits removal to covered class actions involving claims like untruth or deception. And leg-

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(SD Ill., Jan. 30, 2004), App. to Pet. for Cert. 34a–37a; *Spurgeon* v. *Pacific Life Ins. Co.*, No. 04–CV–0355–MJR (SD Ill., June 24, 2004), *id.*, at 59a–60a.

islative history tends to show that this was just what Congress understood. See S. Rep. No. 105–182, p. 8 (1998) (§ 77p(c) "provides that any class action described in Subsection (b) that is brought in a State court shall be removable to Federal district court, and may be dismissed pursuant to the provisions of subsection (b)"); H. R. Rep. No. 105–640, p. 16 (1998) (same).[11]

The funds argue that removal jurisdiction is broader by emphasizing the adjective that introduces subsection (c): "Any" covered action. § 77p(c). But that suggestion would be persuasive only if we stopped reading right there, and we do not stop there; we do not read statutes in little bites. And, as just noted, if we did read the removal power that broadly there would be no point to the phrase "as set forth in subsection (b)," for subsection (b) cases would be removable anyway as a subset of covered class actions. *Ibid.* The funds purport to counter this objection with their argument that on our reading the last phrase of subsection (c) is redundant in providing that removed cases "shall be subject to subsection (b)," since subsection (b) cases would in any event be so subject. *Ibid.* The funds are in fact right about that redundancy, but the point does not count for their side, because the phrase is redundant on their reading, too: any subsection (b) case removed as falling within the broad category of covered class actions would be treated in accordance with subsection (b) if the subsection applied to that case. In sum, we see no reason to reject the straightforward reading: removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection (b).

Once removal jurisdiction under subsection (c) is understood to be restricted to precluded actions defined by subsection (b), a motion to remand claiming the action is not precluded must be seen as posing a jurisdictional issue. If the action is precluded, neither the district court nor the state court may entertain it, and the proper course is to dismiss. If the action is not precluded, the federal court likewise has no jurisdiction to touch the case on the merits, and the proper course is to remand to the state court that can deal with it. In either event, as the Court of Appeals said, the district court's order comes because its adjudicatory power has been exercised and its work is done. But its adjudicatory power is simply its authority to determine its own jurisdiction to deal further with the case, see *United States* v. *Shipp,* 203 U. S. 563, 573 (1906) (opinion for the Court by Holmes, J.) (A federal court "necessarily ha[s] jurisdiction to decide whether the case [is] properly before it"). The work done is jurisdictional,[12] as is the conclusion reached and the order implementing it.[13]

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[11] Like the Court of Appeals here, we said in *Dabit* that a "key provision of the [Act] makes all 'covered class actions' filed in state court removable." *Ante,* at 83, n. 7 (quoting 112 Stat. 3230). We sketched the removal provision in broad strokes then because the question of its scope was not before us. Now that it is, we speak more cautiously.

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[12] The funds argue 15 U. S. C. § 77p confers jurisdiction greater than that necessary to render the preclusion decision, analogizing § 77p(c) to the federal officer removal statute, 28 U. S. C. § 1442(a). If there is any colorable claim that an action is precluded, the argument goes, the district court can keep the case for adjudication, even after concluding on the merits that the state-law claims are not precluded; but because it has discretion to keep the case or remand to state court, a remand is not jurisdictional and hence is reviewable. The argument is flawed for two reasons. The District Court here did not indicate it thought there was any basis to keep the case for further development; right or wrong, it understood that it was making a jurisdictional ruling. Nor is the analogy with federal officer cases sound.

Section 1442(a) is an exception to the "well-pleaded complaint" rule, under which (absent diversity) "a defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law." *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.,* 463 U. S. 1, 10 (1983) (emphasis deleted). The federal officer removal statute allows "suits against federal officers [to] be removed despite the nonfederal cast of the complaint," *Jefferson County* v. *Acker,* 527 U. S. 423, 431 (1999), and reflects a congres-

*[Footnote 13 is on p. 645]*

## III

We have yet to deal with one objection to our application of § 1447(d), which if well taken would be a serious one. The

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sional policy that "federal officers, and indeed the Federal Government itself, require the protection of a federal forum," *Willingham* v. *Morgan*, 395 U. S. 402, 407 (1969). An officer's federal defense need be only colorable to assure the federal court that it has jurisdiction to adjudicate the case, see *Acker*, *supra*, at 431.

The funds assert that a preclusion defense need be only colorable as well, but the Act is different. It avails a defendant of a federal forum in contemplation not of further litigation over the merits of a claim brought in state court, but of termination of the proceedings altogether, and a merely colorable claim of preclusion does not satisfy a district court that it may dismiss a case as precluded by the Act. There is no room for such a case to exist in a limbo of colorable preclusion; if a claim is precluded, it "may [not] be maintained," 15 U. S. C. § 77p(b), and if the claim is not, the federal courts no longer have any business being involved, as there is no longer any federal question on which to moor the district court's jurisdiction. Nor has Congress expressed in the Act, as it did with 28 U. S. C. § 1442(a), any policy of having particular suits tried in a federal court; there is no indication whatsoever in the Act that, apart from its purpose to preclude certain vexing state-law class actions, Congress intended to add other state-law cases to the federal dockets, and there is no apparent federal interest in spending time on such cases akin to the interest in adjudicating suits against federal officers.

[13] The funds suggest, in the alternative, that appellate jurisdiction in this case was proper under *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U. S. 140 (1934). Without passing on the continued vitality of that case in light of § 1447(d), we note that on its own terms it is distinguishable.

In *Waco*, a case was removed to federal court on an invocation of diversity jurisdiction, *id.*, at 141, and the District Court thereafter "entered a single decree embodying . . . separate orders," *id.*, at 142. In one order, the District Court dismissed a cross-complaint against one party. In another, the District Court concluded that because of the dismissal there was no diversity of citizenship and it thus lacked jurisdiction, and so it remanded the case to state court. An appeal was taken from the order of dismissal. This Court determined that the appeal would lie, because "the decree of dismissal preceded that of remand," and because the District Court's order of dismissal was conclusive upon the parties. *Id.*, at 143. We noted that a "reversal [of the dismissal] cannot affect the order

Seventh Circuit's reading of subsection (c) so as to treat the application of the preclusion rule as nonjurisdictional was in part motivated by its assumption that the Act gives federal courts exclusive jurisdiction to decide the preclusion issue. If that is so, and § 1447(d) applies, a remand order based on a finding that an action is not precluded would arguably be immune from review. This is what the funds in effect contend here when they say that a district court's finding of no subsection (b) preclusion would collaterally estop the state court on remand; the district court would have the last word. And of course the funds' discomfort is made acute by our recent decision in *Dabit,* which expressly disavows the district court's limited view of the scope of subsection (b) preclusion.

But a district court does not have the last word on preclusion under the Act, for nothing in the Act gives the federal courts exclusive jurisdiction over preclusion decisions. A covered action is removable if it is precluded, and a defendant can enlist the Federal Judiciary to decide preclusion, but a defendant can elect to leave a case where the plaintiff filed it and trust the state court (an equally competent body, see *Missouri Pacific R. Co.* v. *Fitzgerald,* 160 U. S. 556, 583 (1896)) to make the preclusion determination.

And what a state court could do in the first place it may also do on remand; in this case, the funds can presently argue the significance of *Dabit* and ask for dismissal on grounds of

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of remand, but it will at least, if the dismissal . . . was erroneous, remit the entire controversy, with the [previously dismissed party] still a party, to the state court for . . . further proceedings." *Id.,* at 143–144.

The order appealed in *Waco* was not a remand order; the order here is, and thus falls within § 1447(d)'s bar on appeals of "[a]n order remanding a case" to state court. Moreover, the funds do not explain how to reconcile their argument with *Waco*'s acknowledgment that the order of remand "cannot [be] affect[ed]" notwithstanding any reversal of a separate order, *id.,* at 143. The District Court's remand order here cannot be disaggregated as the *Waco* orders could, and if the Seventh Circuit's preclusion decision stands, there is nothing to remand to state court.

preclusion when they return to the state court. Collateral estoppel should be no bar to such a revisitation of the preclusion issue,[14] given that § 1447(d) prevents the funds from appealing the District Court's decision. See *Standefer* v. *United States*, 447 U. S. 10, 23 (1980) ("[C]ontemporary principles of collateral estoppel . . . strongly militat[e] against giving an [unreviewable judgment] preclusive effect" (citing Restatement (Second) of Judgments § 68.1 (Tent. Draft No. 3, 1976))); see also Restatement (Second) of Judgments § 28(1) (1980) ("Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded [when t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action"). While the state court cannot review the decision to remand in an appellate way, it is perfectly free to reject the remanding court's reasoning, as we explained over a century ago in *Missouri Pacific R. Co.:* "[A]s to applications for removal on the ground that the cause arose under the Constitution, laws, or treaties of the United States," the finality accorded remand orders is appropriate because questions of this character "if decided against the claimant" in state court are "open to revision . . . , irrespective of the ruling of the [federal court] in that regard in the matter of removal." 160 U. S., at 583. Nor is there any reason to see things differently just because the remand's basis coincides entirely with the merits of the federal question; it is only the forum designation that is conclusive. Here, we have no reason to doubt that the state court will duly apply *Dabit*'s holding that holder claims are embraced by subsection (b),[15] but any claim of error on that point can be considered on review by this Court. See *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 12, n. 12 (1983) ("If the state courts reject a claim of federal pre-emption, that decision may ultimately be reviewed on appeal by this Court" (citing *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141 (1982))).

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[14] Modern usage calls for the descriptive term, "issue preclusion," in place of "collateral estoppel." But we are backsliders out of pity for the tired reader; "preclusion" by statutory fiat is enough preclusion for one opinion.

## IV

We hold that the Act does not exempt remand orders from 28 U. S. C. § 1447(d) and its general rule of nonappealability. We therefore vacate the judgment of the Court of Appeals and remand the case with instructions to dismiss the appeal for lack of jurisdiction.

*It is so ordered.*

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join the judgment of the Court, and Parts I, III, and IV of the Court's opinion; I do not join Part II for the reasons set forth below.

The District Court ordered these cases remanded to state court for want of jurisdiction. We know this because the orders say so: "Because the Court lacks subject matter jurisdiction, the Court **REMANDS** this action to the Madison County, Illinois Circuit Court." App. to Pet. for Cert. 27a; see also *id.*, at 30a, 40a, 46a, 51a, 57a, 64a. Even if those decisions were incorrect, the Court of Appeals lacked jurisdiction to review them because 28 U. S. C. § 1447(d) bars appellate review of remand orders based on lack of subject-matter jurisdiction. See, *e. g., Things Remembered, Inc.* v. *Petrarca,* 516 U. S. 124, 127–128 (1995). The Court correctly concludes that the Seventh Circuit's review of the remand orders overstepped its appellate authority. I disagree with the Court's reasoning in Part II, however, because it holds only that the Court of Appeals' recharacterization was incorrect, and not (as I believe) that recharacterization—being a form of review—is categorically forbidden.

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[15] The parties further dispute whether the investors' claims satisfy the other 15 U. S. C. § 77p(b) preclusion prerequisites, particularly the allegation of fraud; the investors take issue with the Seventh Circuit's characterization of their claims as charging fraud or manipulation, not mismanagement. Because the Court of Appeals lacked appellate jurisdiction, its reading of the investors' litigation position is not binding in future proceedings and is open to consideration on remand.

The Court of Appeals rejected the District Court's description of its orders because it believed the District Court had been too loose in its use of the term "jurisdiction." 373 F. 3d 847, 849–850 (2004). What the District Court *actually* did, the Court of Appeals concluded, was to remand on non-jurisdictional grounds (*not* subject to the appellate-review bar of § 1447(d)) after deciding that petitioners' suits were not precluded. Such recharacterization seems to me flatly inconsistent with § 1447(d). Under that section, an "order remanding a case to the State court from which it was removed *is not reviewable* on appeal or otherwise." *Ibid.* (emphasis added). But appellate review is exactly what is involved in looking behind the face of an order to determine its *true* basis: In order to reject a district court's own characterization, a court of appeals must decide, as the Seventh Circuit did here, that the district court was wrong. We have therefore held, in language that makes plain the correct outcome here, that "[i]f a trial judge *purports* to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeal, by mandamus, or otherwise." *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336, 343 (1976) (quoting § 1447(c) (1970 ed.); emphasis added). Whether the District Court was right or wrong—even if it was so badly mistaken that it misunderstood the true basis for its orders—it *purported* to remand for lack of jurisdiction, and § 1447(d) bars any further review.*

Review of the sort engaged in by the Court of Appeals threatens to defeat the purpose of § 1447(d). As we recognized in *Thermtron Products,* the appellate-review bar was enacted "to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues." *Id.,* at 351. Such delay can be created just as easily by asking whether the district court correctly characterized the basis for its order as it can by asking whether that basis was correct—which even the Court of Appeals recognized was beyond its jurisdiction, 373 F. 3d, at 849. See also *Thermtron Products, supra,* at 343 (noting that § 1447(d) "prohibits review of all remand orders [based on lack of subject-matter jurisdiction] whether erroneous or not"). The remand orders in these cases date back to early 2004; over two years later, federal courts are still engaged in appellate review.

The Court should end this delay by holding that appellate courts cannot look behind the stated basis for the district court's remand order. Instead, it concludes that "the District Court *was correct* in understanding its remand order to be dictated by a finding that it lacked removal jurisdiction." *Ante,* at 642 (emphasis added). It seems to me no more within our authority to declare the District Court's views correct than it was within the Court of Appeals' authority to reject them. Either decision is an exercise of appellate review barred by the plain terms of § 1447(d).

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*To say that we cannot recharacterize the District Court's remand for lack of jurisdiction is not to say that the basis for the remand is forever insulated from review. Part III of the Court's opinion makes clear that the underlying legal issue of preclusion remains open in state court, and need not be resolved in accordance with the (unreviewable) views of the District Court.

# HOWARD DELIVERY SERVICE, INC., ET AL. *v.* ZURICH AMERICAN INSURANCE CO.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 05–128. Argued March 21, 2006—Decided June 15, 2006

The Bankruptcy Code accords priorities, among unsecured creditors' claims, for unpaid "wages, salaries, or commissions," 11 U. S. C. § 507(a)(4)(A), and for unpaid contributions to "an employee benefit plan," § 507(a)(5). Petitioner Howard Delivery Service, Inc. (Howard), was required by each State in which it operated to maintain workers' compensation coverage to secure its employees' receipt of health, disability, and death benefits in the event of on-the-job accidents. Howard contracted with respondent Zurich American Insurance Co. (Zurich) to provide this insurance for Howard's operations in ten States. After Howard filed a Chapter 11 bankruptcy petition, Zurich filed an unsecured creditor's claim for some $400,000 in premiums, asserting that they qualified as "contributions to an employee benefit plan" entitled to priority under § 507(a)(5). The Bankruptcy Court denied priority status to the claim, reasoning that because overdue premiums do not qualify as bargained-for benefits furnished in lieu of increased wages, they fall outside § 507(a)(5)'s compass. The District Court affirmed, similarly determining that unpaid workers' compensation premiums do not share the priority provided for unpaid contributions to employee pension and health plans. A Fourth Circuit panel reversed without agreeing on a rationale.

*Held:* Insurance carriers' claims for unpaid workers' compensation premiums owed by an employer fall outside the priority allowed by § 507(a)(5). Although the question is close, such premiums are more appropriately bracketed with liability insurance premiums for, *e. g.*, motor vehicle, fire, or theft insurance, than with contributions made for fringe benefits that complete a pay package, *e. g.*, pension plans and group health, life, and disability insurance, which undisputedly are covered by § 507(a)(5).

*United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29, 29–35, and *Joint Industry Bd. of Elec. Industry* v. *United States*, 391 U. S. 224, 228–229, held that an employer's unpaid contributions to collectively bargained plans providing, respectively, life insurance and annuity benefits to employees did not qualify as "wages" entitled to priority status under the prior bankruptcy law. Congress thereafter enacted what is now § 507(a)(5) in order to provide a priority for the kind of fringe benefits at issue in those cases. Notably, Congress did not enlarge the "wages, salaries, [and] commissions" priority, § 507(a)(4)(A), to include fringe benefits, but instead created a new priority, § 507(a)(5), one step lower than the wage priority. The new provision allows a plan provider to recover unpaid premiums—albeit only after the employees' claims for "wages, salaries, or commissions" have been paid. The current Code's juxtaposition of the wages and employee benefit plan priorities manifests Congress' comprehension that fringe benefits generally complement, or substitute for, hourly pay. Congress tightened the linkage of § 507(a)(4) and (a)(5) by imposing a combined cap on the two priorities, currently set at $10,000 per employee. See § 507(a)(5)(B). Because § 507(a)(4) has a higher priority status, all claims for wages are paid first, up to the $10,000 limit; claims under § 507(a)(5) for benefit plan contributions can be recovered next up to the remainder of the $10,000 ceiling. No other § 507 subsections are so joined together.

Apart from the clues provided by *Embassy Restaurant, Joint Industry Bd.*, and the textual ties binding § 507(a)(4) and (5), Congress left undefined the § 507(a)(5) terms, "*contributions* to an *employee benefit plan* . . . arising from *services rendered.*" (Emphasis added.) Maintaining that § 507(a)(5) covers more than wage substitutes like the ones at issue in *Embassy Restaurant* and *Joint Industry Bd.*, Zurich urges the Court to borrow the encompassing definition of employee benefit plan contained in the Employee Retirement Income Security Act of 1974 (ERISA): "[A]ny plan, fund, or program [that provides] its participants . . . , through the purchase of insurance or otherwise, . . . benefits in the event of sickness, accident, disability, [or] death." 29 U. S. C. § 1002(1). Federal courts have questioned whether ERISA is appropriately used to fill in blanks in a Bankruptcy Code provision, and the panel below parted ways on this issue. In any event, ERISA's signals are mixed, for § 1003(b)(3) specifically exempts from ERISA's coverage the genre of plan here at issue, *i. e.*, one "maintained solely for the purpose of complying with applicable work[ers'] compensation laws." That exemption strengthens the Court's resistance to Zurich's argument. Rather, the Court follows *United States* v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U. S. 213, 219, in noting that "[h]ere and there in the Bankruptcy Code Congress has included specific directions that establish the significance for bankruptcy law of a term used elsewhere in the federal statutes." *Id.*, at 219–220. No such directions are contained in § 507(a)(5), and the Court has no warrant to write them into the text.

This case turns instead on the essential character of workers' compensation regimes. Unlike pension plans or group life, health, and disability insurance—negotiated or granted to supplement, or substitute for, *wages*—workers' compensation prescriptions modify, or substitute for, the common-law tort *liability* to which employers were exposed for work-related *accidents.* Workers' compensation regimes provide something for employees, ensuring limited fixed payments for on-the-job injuries, and something for employers, removing the risk of large judgments and heavy costs in tort litigation. No such tradeoff is involved in employer-sponsored fringe benefit plans. Moreover, employer-sponsored pension and health plans characteristically insure the employee (or his survivor) only. In contrast, workers' compensation insurance shields the insured enterprise. When an employer fails to secure workers' compensation coverage, or loses coverage for nonpayment of premiums, an affected employee's remedy would not lie in a suit for premiums that should have been paid to a compensation carrier. Instead, employees who sustain work-related injuries commonly have recourse to a state-maintained fund or are authorized by state law to pursue the larger recoveries successful tort litigation ordinarily yields. Further distancing workers' compensation and fringe benefits, nearly all States require employers to participate in workers' compensation, with substantial penalties, even criminal liability, for failure to do so. It is relevant, although not dispositive, that States overwhelmingly prescribe and regulate insurance coverage for on-the-job accidents, while commonly leaving fringe benefits to private ordering.

Zurich's argument that according its claim a § 507(a)(5) priority will give workers' compensation carriers an incentive to continue coverage of a failing enterprise, thus promoting rehabilitation of the business, is unpersuasive. Rather than speculating on how such insurers might react were they to be granted a § 507(a)(5) priority, the Court is guided by the Bankruptcy Code's objective of securing equal distribution among creditors, see, *e. g., Kothe* v. *R. C. Taylor Trust,* 280 U. S. 224, 227, and by the corollary principle that preference provisions must be tightly construed, see, *e. g., ibid.* Cases like Zurich's are illustrative. The Bankruptcy Code caps the amount recoverable for contributions to employee benefit plans. Opening the § 507(a)(5) priority to workers' compensation carriers could shrink the amount available to cover unpaid contributions to plans paradigmatically qualifying as wage surrogates, primarily pension and health benefit plans. Pp. 657–668.

403 F. 3d 228, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, THOMAS, and BREYER, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which SOUTER and ALITO, JJ., joined, *post,* p. 668.

*Paul F. Strain* argued the cause for petitioners. On the briefs were *Richard M. Francis, Heather G. Harlan, Lawrence A. Katz,* and *Mitchell Y. Mirviss.*

*Donald B. Verrilli, Jr.,* argued the cause for respondent. With him on the brief were *William M. Hohengarten, Elaine J. Goldenberg, Barbara S. Steiner, Daniel R. Murray, Margaret M. Anderson, Hugh S. Balsam,* and *Karen Lee Turner.**

JUSTICE GINSBURG delivered the opinion of the Court.

The Bankruptcy Code accords a priority, among unsecured creditors' claims, for unpaid "wages, salaries, or commissions," 11 U. S. C. § 507(a)(4)(A), and for unpaid contributions to "an employee benefit plan," § 507(a)(5).[1] It is uncontested here that § 507(a)(5) covers fringe benefits that complete a pay package—typically pension plans, and group health, life, and disability insurance—whether unilaterally provided by an employer or the result of collective bargaining. This case presents the question whether the

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**Donald J. Capuano* and *John M. McIntire* filed a brief for the National Coordinating Committee for Multiemployer Plans as *amicus curiae* urging reversal.

*G. Eric Brunstad, Jr., Rheba Rutkowski,* and *William C. Heuer* filed a brief for the American Home Assurance Co. et al. as *amici curiae* urging affirmance.

[1] All references to provisions of the Bankruptcy Code use the current numbering. At the time respondent Zurich American Insurance Company (Zurich) claimed priority treatment for unpaid workers' compensation premiums, the relevant subsections were numbered (a)(3) (wages) and (a)(4) (employee benefit plans). The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109–8, § 212(2), 119 Stat. 51, altered the priority list so that (a)(3) became (a)(4), and (a)(4) became (a)(5). The only other statutory change relevant here concerns the dollar amount accorded priority status under current § 507(a)(4) and (a)(5). When Zurich filed its proof of claim, the total sum allowed under those two subsections was $4,650 for each employee, see note following 11 U. S. C. § 104 (2000 ed., Supp. III). That ceiling has since been raised, pursuant to § 104, to $10,000 per employee, 11 U. S. C. A. § 507(a)(5)(B)(i) (Supp. 2006).

§ 507(a)(5) priority also encompasses claims for unpaid premiums on a policy purchased by an employer to cover its workers' compensation liability. We hold that premiums owed by an employer to a workers' compensation carrier do not fit within § 507(a)(5).

Workers' compensation laws ensure that workers will be compensated for work-related injuries whether or not negligence of the employer contributed to the injury. To that extent, arrangements for the payment of compensation awards might be typed "employee benefit plan[s]." On the other hand, statutorily prescribed workers' compensation regimes do not run exclusively to the employees' benefit. In this regard, they differ from privately ordered, employer-funded pension and welfare plans that, together with wages, remunerate employees for services rendered. Employers, too, gain from workers' compensation prescriptions. In exchange for no-fault liability, employers gain immunity from tort actions that might yield damages many times higher than awards payable under workers' compensation schedules. Although the question is close, we conclude that premiums paid for workers' compensation insurance are more appropriately bracketed with premiums paid for other liability insurance, *e. g.*, motor vehicle, fire, or theft insurance, than with contributions made to secure employee retirement, health, and disability benefits.

In holding that claims for workers' compensation insurance premiums do not qualify for § 507(a)(5) priority, we are mindful that the Bankruptcy Code aims, in the main, to secure equal distribution among creditors. See *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, 227 (1930); *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, 451 (1937). We take into account, as well, the complementary principle that preferential treatment of a class of creditors is in order only when clearly authorized by Congress. See *Nathanson* v. *NLRB*, 344 U. S. 25, 29 (1952); *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29, 31 (1959).

## I

Petitioner Howard Delivery Service, Inc. (Howard), for many years owned and operated a freight trucking business. Howard employed as many as 480 workers and operated in about a dozen States. Each of those States required Howard to maintain workers' compensation coverage to secure its employees' receipt of health, disability, and death benefits in the event of on-the-job accidents. Howard contracted with Zurich to provide this insurance for Howard's operations in ten States.

On January 30, 2002, Howard filed a Chapter 11 bankruptcy petition. Zurich filed an unsecured creditor's claim in that proceeding, seeking priority status for some $400,000 in unpaid workers' compensation premiums. In an amended proof of claim, Zurich asserted that these unpaid premiums qualified as "[c]ontributions to an employee benefit plan" entitled to priority under § 507(a)(5). App. 32a.[2] The Bankruptcy Court denied priority status to Zurich's claim, reasoning that the overdue premiums do not qualify as bargained-for benefits furnished in lieu of increased wages, hence they fall outside § 507(a)(5)'s compass. App. to Pet. for Cert. 51a–57a. The District Court affirmed, similarly determining that unpaid workers' compensation premiums do not share the priority provided for unpaid contributions to employee pension and health plans. *Id.*, at 39a–50a.

The Court of Appeals for the Fourth Circuit reversed 2 to 1 in a *per curiam* opinion. 403 F. 3d 228 (2005). The judges in the majority, however, disagreed on the rationale. Judge King concluded that § 507(a)(5) unambiguously accorded priority status to claims for unpaid workers' compensation premiums. *Id.*, at 237. Judge Shedd, concurring in the judgment, found the § 507(a)(5) phrase "employee benefit plan" ambiguous. Looking to legislative history, he concluded that Congress likely intended to give past due workers' compensation premiums priority status. *Id.*, at 238–239. In dissent, Judge Niemeyer, like Judge King, relied on the "plain meaning" of § 507(a)(5), but read the provision unequivocally to deny priority status to an insurer's claim for unpaid workers' compensation premiums. *Id.*, at 241–244.

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[2] In its initial proof of claim, Zurich did not check the box marked "Contributions to an employee benefit plan," but instead checked a box marked "Other," and wrote in "Administrative Expense—Insurance Premiums." App. 22a, 30a. Zurich does not argue here that the workers' compensation premiums owed by Howard qualify as administrative expenses entitled to priority under § 507(a)(2).

We granted certiorari, 546 U. S. 1002 (2005), to resolve a split among the Circuits concerning the priority status of premiums owed by a bankrupt employer to a workers' compensation carrier. Compare *In re Birmingham-Nashville Express, Inc.*, 224 F. 3d 511, 517 (CA6 2000) (denying priority status to unpaid workers' compensation premiums), *In re Southern Star Foods, Inc.*, 144 F. 3d 712, 717 (CA10 1998) (same), and *In re HLM Corp.*, 62 F. 3d 224, 226–227 (CA8 1995) (same), with *Employers Ins. of Wausau* v. *Plaid Pantries, Inc.*, 10 F. 3d 605, 607 (CA9 1993) (according priority status), and 403 F. 3d, at 229 (case below) (same).[3]

## II

Adjoining subsections of the Bankruptcy Code, § 507(a)(4) and (5), are centrally involved in this case. Subsections 507(a)(4) and (5) currently provide:

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[3] We have jurisdiction of this case, as did the Court of Appeals, because the District Court's ruling qualifies as a final decision under 28 U. S. C. § 158(d). See 403 F. 3d, at 231, and n. 6 (District Court's ruling effectively concluded the dispute between Zurich and Howard, for the adverse decision rendered Zurich's claim valueless and Zurich agreed to withdraw the claim if it failed to prevail on appeal). See also *In re Saco Local Development Corp.*, 711 F. 2d 441, 444 (CA1 1983) (majority opinion of Breyer, J.) ("Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case*—and in particular, it has long provided that orders finally settling creditors' claims are separately appealable.").

> "(a) The following expenses and claims have priority in the following order:
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> . . . . .
>
> "(4) Fourth, allowed unsecured claims . . . for—
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> "(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual . . . .
>
> . . . . .
>
> "(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan—
>
> "(A) arising from services rendered within 180 days before the date of the filing of the [bankruptcy] petition or the date of the cessation of the debtor's business, whichever occurs first . . . ." 11 U. S. C. § 507.

Two decisions of this Court, *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29 (1959), and *Joint Industry Bd. of Elec. Industry* v. *United States*, 391 U. S. 224 (1968), prompted the enactment of § 507(a)(5). *Embassy Restaurant* concerned a provision of the 1898 Bankruptcy Act that granted priority status to "wages" but said nothing of "employee benefits plans" or anything similar. 11 U. S. C. § 104(a)(2) (1952 ed., Supp. V; repealed 1978). We held that a debtor's unpaid contributions to a union welfare plan—which provided life insurance, weekly sick benefits, hospital and surgical benefits, and other advantages—did not qualify within the priority for unpaid "wages." 359 U. S., at 29–35. In *Joint Industry Bd.*, we followed *Embassy Restaurant* and held that an employer's bargained-for contributions to an employees' annuity plan did not qualify as "wages" entitled to priority status. 391 U. S., at 228–229.

To provide a priority for fringe benefits of the kind at issue in *Embassy Restaurant* and *Joint Industry Bd.*, Congress added what is now § 507(a)(5) when it amended the Bankruptcy Act in 1978. See H. R. Rep. No. 95–595, p. 187 (1977) (hereinafter H. R. Rep.) (explaining that the amendment covers "health insurance programs, life insurance plans, pension funds, and all other forms of employee compensation that [are] not in the form of wages"); S. Rep. No. 95–989, p. 69 (1978). Notably, Congress did not enlarge the "wages, salaries, [and] commissions" priority, § 507(a)(4), to include fringe benefits. Instead, Congress created a new priority for such benefits, one step lower than the wage priority. The new provision, currently contained in § 507(a)(5), allows the provider of an employee benefit plan to recover unpaid premiums—albeit only after the employees' claims for "wages, salaries, or commissions" have been paid. § 507(a)(4).

Beyond genuine debate, the main office of § 507(a)(5) is to capture portions of employee compensation for services rendered not covered by § 507(a)(4). Cf. *Embassy Restaurant*, 359 U. S., at 35; *Joint Industry Bd.*, 391 U. S., at 228–229 (both emphasizing Congress' prerogative in this regard). The current Code's juxtaposition of the wages and employee benefit plan priorities manifests Congress' comprehension that fringe benefits generally complement, or "substitute" for, hourly pay. See H. R. Rep., at 357 (noting "the realities of labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted"); *id.*, at 187 ("[T]o ignore the reality of collective bargaining that often trades wage dollars for fringe benefits does a severe disservice to those working for a failing enterprise."); *In re Saco Local Development Corp.*, 711 F. 2d 441, 449 (CA1 1983) (majority opinion of Breyer, J.) (substitution of fringe benefits for wages "can normally be assumed, unless the employer is a philanthropist").

Congress tightened the linkage of subsections (a)(4) and (a)(5) by imposing a combined cap on the two priorities, currently set at $10,000 per employee. See § 507(a)(5)(B).[4] Because (a)(4) has a higher priority status, all claims for wages are paid first, up to the $10,000 limit; claims under (a)(5) for contributions to employee benefit plans can be recovered next up to the remainder of the $10,000 ceiling. No other subsections of § 507 are joined together by a common cap in this way.

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[4] Section 507(a)(5)(B) provides:

"(a) The following expenses and claims have priority in the following order:

. . . . .

Putting aside the clues provided by *Embassy Restaurant*, *Joint Industry Bd.*, and the textual ties binding § 507(a)(4) and (5), we recognize that Congress left undefined the § 507(a)(5) terms: "*contributions* to an *employee benefit plan* . . . arising from *services rendered* within 180 days before the date of the filing of the [bankruptcy] petition." (Emphasis added.) Maintaining that subsection (a)(5) covers more than wage substitutes of the kind at issue in *Embassy Restaurant* and *Joint Industry Bd.*, Zurich urges the Court to borrow the encompassing definition of employee benefit plan contained in the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.* (2000 ed. and Supp. III). See § 1002(1) (term "employee welfare benefit plan" means, *inter alia*, "any plan, fund, or program [that provides] its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . benefits in the event of sickness, accident, disability, death or unemployment"); § 1002(3) (term "employee benefit plan . . . means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit

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"(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan—

. . . . .

"(B) for each such plan, to the extent of—

"(i) the number of employees covered by each such plan multiplied by $10,000; less

"(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan." 11 U. S. C. § 507.

plan"); cf. § 1003(b)(3) (excluding plans "maintained solely for the purpose of complying with applicable work[ers'] compensation laws or unemployment compensation or disability insurance laws"). The dissent endorses this borrowing. See *post,* at 676.

Federal courts have questioned whether ERISA is appropriately used to fill in blanks in a Bankruptcy Code provision, and the panel below parted ways on this issue. See 403 F. 3d, at 235, n. 9 (King, J., concurring in judgment) ("declin[ing] to rely upon the ERISA definition"); *id.,* at 239–241 (Shedd, J., concurring in judgment) (reading legislative history to indicate that Congress intended " 'employee benefit plan' in the bankruptcy priority provision to have the same meaning that [the term] has in ERISA"); *id.,* at 245 (Niemeyer, J., dissenting) (maintaining that ERISA definition is inapt in Bankruptcy Code priority context); cf. *Birmingham-Nashville Express,* 224 F. 3d, at 516–517 (noting division of opinion but concluding that decisions rejecting incorporation of ERISA's "employee benefit plan" definition into § 507(a)(5) "ha[ve] the better of the argument"); *HLM Corp.,* 62 F. 3d, at 226 ("[T]he ERISA definition and associated court guidelines were designed to effectuate the purpose of ERISA, not the Bankruptcy Code." (internal quotation marks omitted)); *Southern Star Foods,* 144 F. 3d, at 714 (same). Compare Brief for American Home Assurance Company et al. as *Amici Curiae* 17–25 (legislative history suggests Congress intended to incorporate ERISA definition) with Brief for National Coordinating Committee for Multiemployer Plans as *Amicus Curiae* 22–27, and n. 21 (legislative history suggests Congress did not intend to incorporate ERISA definition).

ERISA's omnibus definition does show, at least, that the term "employee welfare benefit plan" is susceptible of a construction that would include workers' compensation plans. That Act's signals are mixed, however, for 29 U. S. C. § 1003(b)(3) specifically exempts from ERISA's coverage the genre of plan here at issue, *i. e.*, one "maintained solely for the purpose of complying with applicable work[ers'] compensation laws."[5] The § 1003(b)(3) exemption strengthens our resistance to Zurich's argument. We follow the lead of an earlier decision, *United States* v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U. S. 213, 219 (1996), in noting that "[h]ere and there in the Bankruptcy Code Congress has included specific directions that establish the significance for bankruptcy law of a term used elsewhere in the federal statutes." *Id.*, at 219–220. No such directions are contained in § 507(a)(5), and we have no warrant to write them into the text.

This case turns, we hold, not on a definition borrowed from a statute designed without bankruptcy in mind, but on the essential character of workers' compensation regimes. Unlike pension provisions or group life, health, and disability insurance plans—negotiated or granted as pay supplements or substitutes—workers' compensation prescriptions have a dominant employer-oriented thrust: They modify, or substitute for, the common-law tort liability to which employers were exposed for work-related accidents. See 6 A. Larson & L. Larson, Workers' Compensation Law § 100.01[1], pp. 100–2 to 100–3 (2005) (hereinafter Larson & Larson); 4 J. Lee & B. Lindahl, Modern Tort Law: Liability and Litigation § 43:25, pp. 43–45 to 43–46 (2d ed. 2003). As typically explained:

> "The invention of workers compensation as it has existed in this country since about 1910 involves a classic social trade-off or, to use a Latin term, a *quid pro*

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[5] Congress also excluded most workers' compensation benefits from the purview of the Davis-Bacon Act, 40 U. S. C. § 3141(2) (2000 ed., Supp. III), a measure that fixes a floor under wages on Government projects. The Davis-Bacon Act incorporates "bona fide fringe benefits," broadly defined, into prevailing wage determinations, but specifically excludes benefits contractors are required to provide under federal, state, or local law. § 3141(2)(B).

> *quo*. . . . What is given to the injured employee is the right to receive certain limited benefits regardless of fault, that is, even in cases in which the employee is partially or entirely at fault, or when there is no fault on anyone's part. What is taken away is the employee's right to recover full tort damages, including damages for pain and suffering, in cases in which there is fault on the employer's part." P. Lencsis, Workers Compensation: A Reference and Guide 9 (1998) (hereinafter Lencsis).

Workers' compensation regimes thus provide something for employees—they ensure limited fixed payments for on-the-job injuries—and something for employers—they remove the risk of large judgments and heavy costs generated by tort litigation. See 6 Larson & Larson § 100.03[1], at 100–11 ("[Workers' compensation] relieves the employer not only of common-law tort liability, but also of statutory liability under virtually all state statutes, as well as of liability in contract and in admiralty, for an injury covered by the compensation act." (footnote omitted)); Lubove, Workmen's Compensation and the Prerogatives of Voluntarism, 8 Lab. Hist. 254, 258–262 (Fall 1967) (workers' compensation programs were adopted by nearly every State in large part because employers anticipated significant benefits from the programs; other programs workers' groups sought to make mandatory—notably, health insurance—were not similarly embraced). No such tradeoff is involved in fringe benefit plans that augment each covered worker's hourly pay.[6]

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[6] Providing health care to workers fosters a healthy and happy work force, and a contented work force benefits employers. The dissent suggests this as a reason to rank workers' compensation insurance with health and pension plans for bankruptcy priority purposes. See *post*, at 672. But the benefit employers gain from providing health and pension plans for their employees is of a secondary order; indeed, under the dissent's logic, wages could be said to "benefit" the employer because they ensure that employees come to work, can afford transportation to the jobsite, etc. These benefits redound to the employer reflexively, as a consequence

Employer-sponsored pension plans, and group health or life insurance plans, characteristically insure the employee (or his survivor) only. In contrast, workers' compensation insurance, in common with other liability insurance in this regard, *e. g.*, fire, theft, and motor vehicle insurance, shield the insured enterprise: Workers' compensation policies both protect the employer-policyholder from liability in tort, and cover its obligation to pay workers' compensation benefits. See *In re HLM Corp.*, 165 B. R. 38, 41 (Bkrtcy. Ct. Minn. 1994). When an employer fails to secure workers' compensation coverage, or loses coverage for nonpayment of premiums, an affected employee's remedy would not lie in a suit for premiums that should have been paid to a compensation carrier. Instead, employees who sustain work-related injuries would commonly have recourse to a state-maintained fund. See, *e. g.*, Minn. Stat. § 176.183, subd. 1 (2004); N. Y. Work. Comp. Law Ann. § 26–a (West Supp. 2006). Or, in lieu of the limited benefits obtainable from a state fund under workers' compensation schedules, the injured employee might be authorized to pursue the larger recoveries successful tort litigation ordinarily yields. See, *e. g.*, *id.*, § 11 (West 2005); W. Va. Code § 23–2–8 (Lexis 2005); Lencsis 67.

Further distancing workers' compensation arrangements from bargained-for or voluntarily accorded fringe benefits, nearly all States, with limited exceptions, require employers to participate in their workers' compensation systems. See, *e. g.*, Ill. Comp. Stat., ch. 820, § 305/4 (West 2004); Minn. Stat. § 176.181, subd. 2 (2004); U. S. Dept. of Labor, Office of Workers' Compensation, State Workers' Compensation Laws, Table 1: Type of Law and Insurance Requirements for Private Employment (2005), online at http://www.dol.gov/esa/regs/statutes/owcp/stwclaw/tables-pdf/table1.pdf (as visited

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of the benefit to the employee. Workers' compensation insurance, by contrast, directly benefits insured employers by eliminating their tort liability for workplace accidents.

June 13, 2006, and available in Clerk of Court's case file). An employer who fails to secure the mandatory coverage is subject to substantial penalties, even criminal liability. We do not suggest, as the dissent hypothesizes, see *post*, at 674, that a compensation carrier would gain § 507(a)(5) priority for unpaid premiums in States where workers' compensation coverage is elective. Nor do we suggest that wage surrogates or supplements, *e. g.*, pension and health benefits plans, would lose protection under § 507(a)(5) if a State were to mandate them. We simply count it a factor relevant to our assessment that States overwhelmingly prescribe and regulate insurance coverage for on-the-job accidents, while commonly leaving pension, health, and life insurance plans to private ordering.[7]

We note that when the Fourth Circuit confronted a claim for workers' compensation premiums owed not to a private insurer but to a state fund, that court ranked the premiums as "excise taxes" qualifying for bankruptcy priority under what is now § 507(a)(8)(E). See *New Neighborhoods, Inc.* v. *West Virginia Workers' Comp. Fund*, 886 F. 2d 714, 718–720 (1989).[8] See also *In re Suburban Motor Freight, Inc.*, 998

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[7] *Saco Local Development Corp.*, 711 F. 2d, at 448–449, we note, is not at odds with our conclusion that unpaid workers' compensation premiums do not qualify for priority status. The First Circuit held in *Saco* that a group life, health, and disability insurance plan fit within § 507(a)(5), though the benefit package was unilaterally provided by the employer, and not installed pursuant to collective bargaining. Wage surrogates, then-Judge Breyer explained, need not be negotiated to qualify under § 507(a)(5) as "employee benefit plan[s]," for "Congress' object in enacting [that subsection] was to extend the 1898 Act's wage priority to new forms of compensation, such as insurance and other fringe benefits." *Id.*, at 449. *Saco* did not involve workers' compensation regimes, and the First Circuit expressed no opinion on them.

[8] The state fund in *New Neighborhoods*, it appears, did not urge that claims for unpaid workers' compensation premiums qualify for the higher (a)(5) priority. The Fourth Circuit's opinion in that case, however, suggests that the court assumed a private compensation carrier would be

F. 2d 338, 342 (CA6 1993) ("Where a State 'compel[s] the payment' of 'involuntary exactions, regardless of name,' and where such payment is universally applicable to similarly situated persons or firms, these payments are taxes for bankruptcy purposes." (quoting *New Neighborhoods,* 886 F. 2d, at 718–719; alteration in original)); LeRoy et al., Workers' Compensation in Bankruptcy: How Do the Parties Fare? 24 Tort & Ins. L. J. 593, 623–624 (1989) (describing disagreement among courts on whether payments to state-run workers' compensation funds qualify as excise taxes under § 507(a)(8)). We express no view on the § 507(a)(8)(E) issue presented in *New Neighborhoods.* We venture only this observation: It is common for Congress to prefer Government creditors over private creditors, see *Birmingham-Nashville Express,* 224 F. 3d, at 517–518; it would be anomalous, however, to advance Zurich's claim to level (a)(5) while leaving state-fund creditors at level (a)(8).

Zurich argues that according its claim an (a)(5) priority will give workers' compensation carriers an incentive to continue coverage of a failing enterprise, thus promoting rehabilitation of the business. It may be doubted whether the projected incentive would outweigh competing financial pressure to pull the plug swiftly on an insolvent policyholder, and thereby contain potential losses. An insurer undertakes to pay the scheduled benefits to workers injured on the job while the policy is in effect. In the case of serious injuries, however, benefits may remain payable years after termination of coverage. See 1 Larson & Larson §§ 10.02–10.03, at 10–3 to 10–7; Lencsis 51–52. While cancellation relieves the insurer from responsibility for future injuries, the insurer cannot escape the obligation to continue paying benefits for enduring maladies or disabilities, even though no premiums are paid by the former policyholder. An insurer

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accorded no priority. See 886 F. 2d, at 720 (under court's holding, "a state agency is given, as an insurer, priority in bankruptcy when a private insurer is not").

would likely weigh in the balance the risk of incurring fresh obligations of long duration were it to continue insuring employers unable to pay currently for coverage. That consideration might well be controlling even with an assurance of priority status, for there is no guarantee that creditors accorded preferred positions will in fact be paid. See Tr. of Oral Arg. 31–32 ("[A]s soon as they smell bankruptcy, they're going to pull the plug anyway." (SCALIA, J.)); LeRoy, *supra*, at 596 (noting "general reluctance on the part of private insurers to provide debtors with the necessary Workers' Compensation coverage").

Rather than speculating on how workers' compensation insurers might react were they to be granted an (a)(5) priority, we are guided in reaching our decision by the equal distribution objective underlying the Bankruptcy Code, and the corollary principle that provisions allowing preferences must be tightly construed. See *Kothe*, 280 U. S., at 227 ("The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate . . . ."); *Nathanson*, 344 U. S., at 29 ("The theme of the Bankruptcy Act is 'equality of distribution' . . . ; and if one claimant is to be preferred over others, the purpose should be clear from the statute." (quoting *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U. S. 215, 219 (1941))); H. R. Rep., at 186; 2 Collier Bankruptcy Manual ¶ 507.01, p. 507–4 (rev. 3d ed. 2005) ("[P]riorities under the Code are to be narrowly construed.").

Every claim granted priority status reduces the funds available to general unsecured creditors and may diminish the recovery of other claimants qualifying for equal or lesser priorities. See *Joint Industry Bd.*, 391 U. S., at 228–229. "To give priority to a claimant not clearly entitled thereto is not only inconsistent with the policy of equality of distribution; it dilutes the value of the priority for those creditors Congress intended to prefer." *In re Mammoth Mart, Inc.*, 536 F. 2d 950, 953 (CA1 1976). Cases like Zurich's are illustrative. The Bankruptcy Code caps the amount recoverable for contributions to employee benefit plans. See *supra*, at 659–660. Opening the (a)(5) priority to workers' compensation carriers could shrink the amount available to cover unpaid contributions to plans paradigmatically qualifying as wage surrogates, prime among them, pension and health benefit plans.[9]

In sum, we find it far from clear that an employer's liability to provide workers' compensation coverage fits the § 507(a)(5) category "contributions to an employee benefit plan . . . arising from services rendered." Weighing against such categorization, workers' compensation does not compensate employees for work performed, but instead, for on-the-job injuries incurred; workers' compensation regimes substitute not for wage payments, but for tort liability. Any doubt concerning the appropriate characterization, we conclude, is best resolved in accord with the Bankruptcy Code's equal distribution aim. We therefore reject the expanded interpretation Zurich invites. Unless and until Congress otherwise directs, we hold that carriers' claims for unpaid workers' compensation premiums remain outside the priority allowed by § 507(a)(5).

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For the reasons stated, the judgment of the United States Court of Appeals for the Fourth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE KENNEDY, with whom JUSTICE SOUTER and JUSTICE ALITO join, dissenting.

The Court of Appeals for the Fourth Circuit held that payments for workers' compensation coverage are "contributions to an employee benefit plan . . . arising from services rendered." 11 U. S. C. § 507(a)(5). In reversing that judgment the Court's opinion relies on the premise that "statutorily prescribed workers' compensation regimes do not run exclusively to the employees' benefit." *Ante*, at 655. This rationale, however, does not suffice to justify the Court's holding. It does not accord, moreover, with the text or purpose of the bankruptcy priority defined in § 507(a)(5). These are the main points of this respectful dissenting opinion.

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[9] The dissenting opinion nowhere homes in on the reality that including amounts owed to workers' compensation carriers risks diminishing funds available to cover contributions to workers' pension and health-care plans.

## I

Before commencing a more detailed discussion of the central issue, certain preliminary matters must be addressed. To begin with, the Court states a background rule of construction that, when we interpret the Bankruptcy Code, "provisions allowing preferences must be tightly construed." *Ante*, at 667. The Court links this rule with a general objective in the Code for equal distribution. *Ibid.* That objective, it is true, is acknowledged by our precedents, and we have said that a Code provision must indicate a clear purpose to prefer one claim over another before a priority will be found. See *Nathanson* v. *NLRB*, 344 U. S. 25, 29 (1952). This is different, though, from establishing an interpretive principle of strict construction when the Code addresses priorities, for strict construction can be in tension with the objective of "equality of distribution for similar creditors." *Small Business Administration* v. *McClellan*, 364 U. S. 446, 452 (1960). The bankruptcy priorities, then, should not be read simply to give priorities to as few creditors as possible. They should be interpreted in accord with the principle of equal treatment of like claims. In any event the priority provisions should not be read so narrowly as to conflict with their plain meaning.

In accord with these principles the Court does not seem to dispute that the payments at issue here are "contributions" that "aris[e] from services rendered," § 507(a)(5).

There seems little doubt that both these statutory requirements are met. Petitioner Howard Delivery Service, Inc. (Howard), argues that a contribution must be voluntary; and it says that because the workers' compensation payments in this case are mandatory, they cannot be contributions. In some situations—for example, in discussing charitable contributions—it is possible to read "contributions" as Howard suggests. See Webster's Third New International Dictionary 496 (1971) (defining "contribution" as "a sum or thing voluntarily contributed"). In the context of employer payments, however, the voluntariness requirement does not accord with the usual meaning of the word. See *ibid.* (defining "contribution" alternatively as "a sum paid by an employer to an unemployment or group-insurance fund"). Many federal statutes and this Court's own cases expressly refer to "mandatory contributions" when discussing payments by employers and employees. See, *e. g.*, 26 U. S. C. § 411(a)(3)(D); 29 U. S. C. § 1053(a)(3)(D); § 1054(c)(2)(C); § 1344; *Hughes Aircraft Co.* v. *Jacobson*, 525 U. S. 432, 435 (1999); *General Building Contractors Assn., Inc.* v. *Pennsylvania*, 458 U. S. 375, 394 (1982); *United States* v. *Lee*, 455 U. S. 252, 258 (1982). Even for pension and health benefit plans, which undeniably fall within the § 507(a)(5) priority, the payments are rarely if ever voluntary in the charitable sense that Howard invokes. The mandatory nature of most workers' compensation coverage, then, fails to establish that the payments are not contributions.

Howard's argument that the workers' compensation payments here do not "aris[e] from services rendered," § 507(a)(5), is also unpersuasive. This phrase, according to Howard, does not cover payments to insurance companies because those payments are made in exchange for the services of the insurance company, not the services of the employees. The Court seems to accept that insurance payments can receive the priority, see *ante*, at 659, 661–662, and this is part of the statute's necessary operation. Even if the payments may go to the insurance company, they are predicated nonetheless on the employees' performing services for the employer. They therefore "aris[e] from services rendered" in the same manner as do payments to a pension, health, or disability plan. From a practical standpoint, moreover, "[t]o allow the insurer to obtain its premiums through the priority would seem the surest way to provide the employees with the policy benefits to which they are entitled." *In re Saco Local Development Corp.*, 711 F. 2d 441, 449 (CA1 1983) (majority opinion by Breyer, J.).

## II

The question that remains—and my main point of disagreement with the Court—is whether workers' compensation insurance qualifies as an "employee benefit plan." The answer, one would think, depends on whether workers' compensation plans provide benefits to employees. It is clear that they do, as the employer's contributions enable the insurer to give out substantial payments to employees.

Even assuming that the benefit the employer provides must be a net benefit, this condition is easily satisfied. It is true that, in return for receiving workers' compensation, employees give up some of the common-law tort remedies they otherwise could have pursued. See *ante*, at 662–663. The common-law remedies, though, typically required the employer to be at fault; and they were further limited by the defenses of contributory negligence, assumption of risk, and the fellow-servant doctrine. See 1 A. Larson & L. Larson, Workers' Compensation Law § 2.03 (2005). As a result, only a small percentage of injured workers received any recovery. *Ibid.* Workers' compensation plans, even considering the tort claims relinquished, thus are generally a benefit to employees. See *id.*, § 2.03, at 2–6 (noting the "helplessness which characterized the position of the injured worker of the precompensation era"). Even where an employee might have received greater damages in a tort suit, the greater speed and certainty of payment in workers' compensation is often worth the tradeoff. In many States, moreover, the employee has a choice to opt out of the workers' compensation system, leaving him or her with traditional tort remedies. See, *e. g.*, Ariz. Rev. Stat. Ann. § 23–906 (West 1995); Cal. Lab. Code Ann. § 4154 (West 2003); Ky. Rev. Stat. Ann. § 342.395 (West 2005); Mass. Gen. Laws, ch. 152, § 24 (West 2004); N. D. Cent. Code Ann. § 65–07.1–03 (Lexis 2003); Pa. Stat. Ann., Tit. 77, § 1402(b) (Purdon 2002); R. I. Gen. Laws § 28–29–17 (Supp. 2005). When the employee chooses workers' compensation, it plainly should be considered a benefit. For these reasons, workers' compensation plans, on the whole, are a benefit to employees; and indeed, the Court does not suggest otherwise.

Instead, the Court holds that workers' compensation is not an "employee benefit plan" largely because it also benefits employers. *Ante*, at 663. The text of the statute does not refer to whether the plan benefits employers, nor would it make sense to do so. Since the goal of the priority is to protect the benefits of employees, there is little reason to suppose that employees should lose that protection based on the additional fact that employers may gain something as well. Employers rarely make large payments to employee funds out of altruism, and surely the Court should not hold that employee benefits provide no benefit to the employer. In the case of health benefits, for example, the employer may receive tax breaks, good will, a healthy work force, and the leverage to pay lower wages. Workers' compensation cannot be distinguished on this basis from pension, health, or disability plans, all of which the Court recognizes as covered by the priority.

The Court's three other bases for treating workers' compensation differently also find no support in the Bankruptcy Code. First, the Court maintains, based on the purpose and structure of the "employee benefit plan" priority in relation to the wage priority of § 507(a)(4), that only wage substitutes are covered. *Ante*, at 657–660. Even assuming this proposition were correct, it would not lead to the Court's conclusion. That is because workers' compensation plans, as a matter of economic realities, are wage substitutes. The Court made this precise point in one of the first cases addressing a workers' compensation scheme: "[J]ust as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale." *New York Central R. Co.* v. *White*, 243 U. S. 188, 201–202 (1917). Recent empirical studies confirm that employers pass on the cost of workers' compensation to employees in the form of lower wages. See Fishback & Kantor, Did Workers Pay for the Passage of Workers' Compensation Laws? 110 Q. J. Econ. 713 (1995); Gruber & Krueger, The Incidence of Mandated Employer-Provided Insurance: Lessons from Workers' Compensation Insurance, 5 Tax Policy and the Economy 111 (D. Bradford ed. 1991); Viscusi & Moore, Workers' Compensation: Wage Effects, Benefit Inadequacies, and the Value of Health Losses, 69 Rev. Econ. & Statistics 249 (1987).

Second, the mandatory nature of most workers' compensation plans does not change the applicability of the priority. The benefit to employees is real and significant regardless of whether the government has mandated the benefit. While States generally "prescribe and regulate" workers' compensation and leave other benefits "to private ordering," *ante*, at 665, the presence of bargaining has no bearing on whether contributions should receive priority. See *Saco*, *supra*, at 448–449. Indeed, it is difficult to imagine that if States began to mandate other kinds of benefits, those benefits would promptly fall outside § 507(a)(5). This would amount to saying that whenever some form of protection for employees comes to be accepted as so necessary for their welfare that it is mandated as an employer responsibility it is no longer a benefit.

While the Court says the general practice among the States of making workers' compensation mandatory is just one factor in the analysis, *ante,* at 665, presumably the Court does not suggest that an optional workers' compensation scheme is an "employee benefit plan" simply because other States have mandatory schemes. Assuming, then, that a given optional workers' compensation scheme might receive the priority, the Court's approach will create uncertainty about application of the priority to the relevant payments. Only a few States have wholly permissive regimes, see, *e. g.,* Tex. Lab. Code Ann. § 406.002 (West 2006), but many more offer exemptions for particular kinds of employers, see, *e. g.,* Tenn. Code Ann. § 50–6–106(5) (2005); Mich. Comp. Laws § 418.118(2) (1979). Not only will application of the priority depend on varying state laws, but also multistate workers' compensation plans may have to be segmented for purposes of determining bankruptcy priorities. There is nothing in § 507(a)(5) to suggest an intent to cause this kind of disuniformity.

Third, the existence of state funds to compensate employees when their employers fail to provide workers' compensation benefits has little relevance. Once again, it is unclear how much weight the Court places on this factor, and it seems doubtful that the Court would remove health plans from the priority simply because a State created a fallback public health system. In any event state fallback funds do not change the fact that the employer is providing a benefit; a fallback fund simply indicates the employee could have received the benefit from somewhere else. Were it otherwise, pension plans would also fall outside the priority, since it appears they must provide benefits even if the employer has defaulted on its contributions. See *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.,* 472 U. S. 559, 567, n. 7 (1985) (citing Department of

Labor advisory opinion). As a practical matter, moreover, most large multiemployer plans effectively guarantee compensation (unless all the employers happen to go bankrupt at the same time), and the Pension Benefit Guaranty Corporation ensures payment of at least some of the promised benefits. The exclusion of these plans from the priority, however, would accord with neither the text of the provision nor the commonsense notion that protecting the insurer—whether it be a private company, a multiemployer plan, or a government fund—is the best way to protect the employees. See *Saco*, 711 F. 2d, at 449. Simply put, harm to the insurer will be passed along to the employees, either by rendering the insurer unable to pay or causing it to charge higher rates for the same coverage.

Finally, even if the language of § 507(a)(5) were ambiguous, the definition of "employee benefit plan" in the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.* (2000 ed. and Supp. III), would lend considerable support to respondent's view. ERISA defines "employee benefit plan" as including an "employee welfare benefit plan," § 1002(3), which in turn "mean[s] any plan, fund, or program which . . . was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . benefits in the event of sickness, accident, disability, death or unemployment," § 1002(1). The definition of a term in one statute does not necessarily control the interpretation of that term in another statute, for where the purposes or contexts are different the terms may take on different meanings. See *United States* v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U. S. 213, 219–224 (1996). Where no conflicting purpose or context is apparent, though, other statutes may provide at least some evidence of Congress' understanding. See *Securities Industry Assn.* v. *Board of Governors, FRS*, 468 U. S. 137, 150–151 (1984); see also *ante*, at 661–662.

The ERISA definition is of particular relevance here given that "employee benefit plan" is not a generic phrase but something closer to a term of art, with a meaning that seems unlikely to change based on statutory context. Also, neither Howard nor the Court cites any source for a definition of "employee benefit plan" that would exclude workers' compensation. The Court attempts to minimize the significance of the ERISA definition by noting that ERISA exempts from its coverage any plan "maintained solely for the purpose of complying with applicable workmen's compensation laws." § 1003(b)(3); see *ante*, at 661–662. Congress exempted these plans from coverage, but it did not exclude them from its definition, and this is the relevant consideration. Indeed, the language of the exclusion confirms that workers' compensation is an employee benefit plan. See § 1003(b) ("The provisions of this subchapter shall not apply to any employee benefit plan if . . . such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws"). The exemption also belies the Court's position because it shows that mandatory workers' compensation plans were not included in the definition for any purpose particular to ERISA. Instead, since they were exempted from coverage, the most plausible reason for their inclusion (only to be then excluded) is that Congress was simply giving the ordinary definition of the term. There is no indication in § 507(a)(5) that Congress chose to depart from that ordinary definition. By contrast, when Congress wanted a particular provision of the Bankruptcy Code to narrow the ordinary definition to exclude mandatory workers' compensation, it did so expressly by referring to those plans covered by ERISA. See 11 U. S. C. § 541(b)(7).

An "employee benefit plan," whether viewed as a term of art or in accordance with its plain meaning, includes workers' compensation. These are the reasons for my respectful dissent.

# EMPIRE HEALTHCHOICE ASSURANCE, INC., DBA EMPIRE BLUE CROSS BLUE SHIELD *v.* McVEIGH, AS ADMINISTRATRIX OF THE ESTATE OF McVEIGH

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 05–200. Argued April 25, 2006—Decided June 15, 2006

Under the Federal Employees Health Benefits Act of 1959 (FEHBA), the Office of Personnel Management (OPM) negotiates and regulates health-benefits plans for federal employees. See 5 U. S. C. § 8902(a). FEHBA provides for Government payment of about 75% of health-plan premiums, and for enrollee payment of the rest. § 8906(b). Premiums thus shared are deposited in a special Treasury Fund, from which carriers draw to pay for covered benefits, § 8909(a). FEHBA has a preemption provision which provides: "The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law . . . which relates to health insurance or plans." § 8902(m)(1). The Act contains no provision addressing carriers' subrogation or reimbursement rights. FEHBA's sole jurisdictional provision vests federal district courts with "original jurisdiction . . . of a civil action or claim against the United States." § 8912. While an OPM regulation channels disputes over coverage or benefits into federal court by designating OPM the sole defendant, see 5 CFR § 890.107(c), no law opens federal courts to carriers seeking reimbursement.

OPM has contracted with the Blue Cross Blue Shield Association (BCBSA) to provide a nationwide fee-for-service health plan administered by local companies (Plan). The Plan obligates the carrier to make "a reasonable effort" to recoup amounts paid for medical care, and the statement of benefits the carrier distributes alerts enrollees that recoveries they receive must be used to reimburse the Plan for benefits paid. Petitioner Empire HealthChoice Assurance, Inc. (Empire), administers the BCBSA Plan as it applies to federal employees in New York State. Respondent Denise McVeigh (McVeigh) is the administrator of the estate of Joseph McVeigh (Decedent), a former Plan enrollee who was injured in an accident. This case originated when a state-court tort suit brought by McVeigh against third parties alleged to have caused the Decedent's injuries terminated in a settlement. Empire filed this suit in federal court invoking 28 U. S. C. § 1331, which authorizes jurisdiction over "civil actions arising under the . . . laws . . . of the United States." Empire sought reimbursement of the $157,309 it had paid under the Plan for the Decedent's medical care, with no offset for McVeigh's attorney's fees or other litigation costs in the state-court tort action. The District Court granted McVeigh's motion to dismiss for want of subject-matter jurisdiction.

The Second Circuit affirmed, holding that Empire's claim arose under state law. Observing that FEHBA's text does not authorize carriers to vindicate in federal court their rights against enrollees under FEHBA-authorized contracts, the court concluded that federal jurisdiction could exist only if federal common law governed Empire's claim. Quoting *Boyle* v. *United Technologies Corp.*, 487 U. S. 500, 507, 508, the appeals court stated that courts may create federal common law only when state law would (1) "'significant[ly] conflict'" with (2) "'uniquely federal interest[s].'" Empire maintained that its contract-derived reimbursement claim implicated "uniquely federal interest[s]" because (1) reimbursement directly affects the United States Treasury and the cost of providing health benefits to federal employees, and (2) Congress has expressed its interest in maintaining uniformity among the States on matters relating to federal health-plan benefits. The court acknowledged that the case involved such interests, but found that Empire had not identified specific ways in which the operation of state law would conflict materially with the policies underlying FEHBA in the circumstances presented. Also rejecting Empire's argument that FEHBA's preemption provision independently conferred federal jurisdiction, the court emphasized that § 8902(m)(1) makes no reference to a federal right of action in, or federal jurisdiction over, a contract-derived reimbursement claim.

*Held:* Section 1331 does not encompass Empire's suit. Pp. 689–701.

(a) A case "aris[es] under" federal law for § 1331 purposes if "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 27–28. Pp. 689–690.

(b) *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, does not provide a basis for federal jurisdiction here. In *Clearfield*, a Government suit against a bank to recover the amount paid on a Government check on which the payee's name had been forged, *id.*, at 365, the Court held that "[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than [state] law," *id.*, at 366. In post-*Clearfield* decisions, however, the Court made clear that uniform federal law need not always be applied in Government litigation. For example, in *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 740, the Court declared that "the prudent course" is often "to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." The reimbursement and subrogation provisions in the OPM–BCBSA contract are linked together and depend upon a recovery from a third party under terms and conditions ordinarily governed by state law. Focusing on reimbursement, the appeals court determined that Empire has not demonstrated a significant conflict between an identifiable federal interest and the operation of state law. Unless and until that showing is made, there is no cause to displace state law, much less to lodge this case in federal court. Pp. 690–693.

(c) Empire and *amicus* United States argue that, under *Jackson Transit Authority* v. *Transit Union*, 457 U. S. 15, 22, Empire's reimbursement claim, arising under the OPM–BCBSA contract, states a federal claim because Congress intended all rights and duties stemming from that contract to be federal in nature.

The reliance placed on *Jackson Transit* is surprising, for the Court there determined that the claim at issue—a union's suit against a city agency to enforce agreements the parties had made in light of § 13(c) of the Urban Mass Transportation Act of 1964 (UMTA), which conditioned the city's receipt of federal funds on preservation of employees' collective-bargaining rights—did not arise under federal law, but was instead "governed by state law [to be] applied in state cour[t]." *Id.*, at 29. The Court there acknowledged prior decisions "determin[ing] that a plaintiff stated a federal claim when he sued to vindicate contractual rights *set forth by federal statutes* [that] lacked express provisions creating federal causes of action." *Id.*, at 22 (emphasis added). However, the Court held that these cases did not control because "the critical factor" in each of them was "the congressional intent behind the particular provision at issue." *Ibid.* Although there were some indications that the UMTA made "§ 13(c) agreements and collective-bargaining contracts creatures of federal law," *id.*, at 23, countervailing considerations—primarily a longstanding National Labor Relations Act exemption for labor relations between local governments and their employees—demonstrated a congressional intent to the contrary, *id.*, at 23–24.

Measured against *Jackson Transit*'s discussion of when a claim arises under federal law, Empire's contract-derived reimbursement claim is not a "creatur[e] of federal law." *Id.*, at 23. While distinctly federal elements are involved here, countervailing considerations control, particularly FEHBA's jurisdictional provision, § 8912, which opens the federal district-court door to civil actions "against the United States." OPM's regulation, 5 CFR § 890.107(c), instructs enrollees seeking to challenge benefit denials to proceed in federal court against OPM "and not against the carrier or carrier's subcontractors." Read together, these prescriptions ensure that beneficiaries' suits will land in federal court. Had Congress found it necessary or proper to extend federal jurisdiction to contract-derived reimbursement claims between carriers and insured workers, it would have been easy enough to say so. Cf. 29 U. S. C. § 1132(a)(3). *Jackson Transit* noted that while "private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes," 457 U. S., at 22, *Jackson Transit* involved no such right.

Nor can § 8902(m)(1), FEHBA's preemption prescription, be read as a jurisdiction-conferring provision. That prescription is unusual in that it renders preemptive contract terms in health insurance plans, not provisions enacted by Congress. A prescription of that unusual order warrants cautious interpretation. Section 8902(m)(1) is a puzzling measure, open to more than one construction, and no prior decision seems to us precisely on point. If § 8902(m)(1) does not cover contract-based reimbursement claims, then federal jurisdiction clearly does not exist. But even if § 8902(m)(1) reaches such claims, the prescription is not sufficiently broad to confer federal jurisdiction. If Congress intends a preemption instruction completely to displace ordinarily applicable state law, and to confer federal jurisdiction thereby, it may be expected to make that atypical intention clear. Cf., *e. g., Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U. S. 424, 432–433. Congress has not done so here. Section 8902(m)(1) does not purport to render inoperative *any and all* state laws that in some way bear on federal employee-benefit plans. Cf. 29 U. S. C. § 1144(a). And, given that § 8902(m)(1) declares no federal law preemptive, but instead, terms of an OPM–BCBSA negotiated contract, a modest reading of the provision is in order. Furthermore, a reimbursement right of the kind Empire here asserts stems from a personal-injury recovery, and the claim underlying that recovery is plainly governed by state law. This Court is not prepared to say, based on the presentations made in this case, that under § 8902(m)(1), an OPM–BCBSA contract term would displace every condition state law places on that recovery. The BCBSA Plan's statement of benefits links together the carrier's right to reimbursement from the insured and its right to subrogation. Empire's subrogation right allows it, once it has paid an insured's medical expenses, to recover directly from a third party responsible for the insured's injury or illness. Had Empire taken that course, no access to a federal forum could have been predicated on the OPM–BCBSA contract right. The tortfeasors' liability, whether to the insured or the insurer, would be governed not by an agreement to which the tortfeasors are strangers, but by state law, and §8902(m)(1) would have no sway. Pp. 693–699.

(d) Also rejected is the United States' alternative argument that Empire's reimbursement claim arises under federal law for §1331 purposes because federal law is a necessary element of the carrier's claim for relief. In making this argument, the Government relies on *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Mfg.*, 545 U. S. 308, which involved real property owned by Grable that the Internal Revenue Service (IRS) seized to satisfy a federal tax deficiency, *id.*, at 310. Grable received notice of the seizure by certified mail before the IRS sold the property to Darue. Grable later sued Darue in state court to quiet title, asserting that Darue's record title was invalid because the IRS had conveyed the seizure notice improperly under 26 U. S. C. §6335(a), which requires that "notice in writing . . . be given . . . to the owner . . . or . . . left at his usual place of abode or business." Darue removed the case to federal court. Alleging that Grable's title depended on the interpretation of a federal statute, §6335(a), Darue invoked federal-question jurisdiction under 28 U. S. C. §1331. This Court held that the removal was proper because §6335(a)'s meaning was an important federal-law issue that sensibly belonged in a federal court, and the question whether Grable received adequate notice was "the only . . . issue contested in the case." 545 U. S., at 315. This case is poles apart from *Grable.* Here, the reimbursement claim was triggered, not by a federal agency's action, but by the settlement of a personal-injury action launched in state court, and the bottom-line practical issue is the share of that settlement properly payable to Empire. *Grable* presented a nearly pure issue of law, the resolution of which would establish a rule applicable to numerous tax sale cases. Empire's reimbursement claim, in contrast, is fact-bound and situation-specific. Although the United States is correct that a reimbursement claim may also involve as an issue the extent to which the reimbursement should take account of attorney's fees expended to obtain the tort recovery, it is hardly apparent why a proper federal-state balance would place such a nonstatutory issue under the complete governance of federal law, to be declared in a federal forum. The state court in which the personal-injury suit was lodged is competent to apply federal law, to the extent it is relevant, and would seem best positioned to determine the lawyer's part in obtaining, and fair share in, the tort recovery. The Government's important interests in attracting able workers and ensuring their health and welfare do not warrant turning into a discrete and costly "federal case" an insurer's contract-derived claim to be reimbursed from a federal worker's state-court-initiated tort litigation. This case cannot be squeezed into the slim category *Grable* exemplifies. Pp. 699–701.

396 F. 3d 136, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, and THOMAS, JJ., joined. BREYER, J., filed a dissenting opinion, in which KENNEDY, SOUTER, and ALITO, JJ., joined, *post,* p. 702.

*Anthony F. Shelley* argued the cause for petitioner. With him on the briefs were *Alan I. Horowitz, Laura G. Ferguson, Kathleen M. Sullivan, Roger G. Wilson, Paul F. Brown,* and *William A. Breskin.*

*Sri Srinivasan* argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Clement, Assistant Attorney General Keisler, Deputy Solicitor General Kneedler, James A. Feldman, Mark B. Stern, Alisa B. Klein, Mark A. Robbins,* and *James S. Green.*

*Thomas J. Stock* argued the cause for respondent. With him on the brief were *Harry Raptakis* and *Victor A. Carr.**

JUSTICE GINSBURG delivered the opinion of the Court.

The Federal Employees Health Benefits Act of 1959 (FEHBA), 5 U. S. C. §8901 *et seq.* (2000 ed. and Supp. III), establishes a comprehensive program of health insurance for federal employees. The Act authorizes the Office of Personnel Management (OPM) to contract with private carriers to offer federal employees an array of health-care plans. See §8902(a) (2000 ed.). Largest of the plans for which OPM has contracted, annually since 1960, is the Blue Cross Blue Shield Service Benefit Plan (Plan), administered by local Blue Cross Blue Shield companies. This case concerns the proper forum for reimbursement claims when a Plan beneficiary, injured in an accident, whose medical bills have been paid by the Plan administrator, recovers damages (unaided by the carrier-administrator) in a state-court tort action against a third party alleged to have caused the accident.

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**Clinton A. Krislov* and *Michael R. Karnuth* filed a brief for Julia Cruz, as representative of Jose S. Cruz, as *amicus curiae* urging affirmance.

FEHBA contains a preemption clause, § 8902(m)(1), displacing state law on issues relating to "coverage or benefits" afforded by health-care plans. The Act contains no provision addressing the subrogation or reimbursement rights of carriers. Successive annual contracts between OPM and the Blue Cross Blue Shield Association (BCBSA) have obligated the carrier to make "a reasonable effort" to recoup amounts paid for medical care. App. 95, 125. The statement of benefits distributed by the carrier alerts enrollees that all recoveries they receive "must be used to reimburse the Plan for benefits paid." *Id.*, at 132; see also *id.*, at 146, 152.

The instant case originated when the administrator of a Plan beneficiary's estate pursued tort litigation in state court against parties alleged to have caused the beneficiary's injuries. The carrier had notice of the state-court action, but took no part in it. When the tort action terminated in a settlement, the carrier filed suit in federal court seeking reimbursement of the full amount it had paid for the beneficiary's medical care. The question presented is whether 28 U. S. C. § 1331 (authorizing jurisdiction over "civil actions arising under the . . . laws . . . of the United States") encompasses the carrier's action. We hold it does not.

FEHBA itself provides for federal-court jurisdiction only in actions against the United States. Congress could decide and provide that reimbursement claims of the kind here involved warrant the exercise of federal-court jurisdiction. But claims of this genre, seeking recovery from the proceeds of state-court litigation, are the sort ordinarily resolved in state courts. Federal courts should await a clear signal from Congress before treating such auxiliary claims as "arising under" the laws of the United States.

## I

FEHBA assigns to OPM responsibility for negotiating and regulating health-benefits plans for federal employees. See

5 U. S. C. § 8902(a). OPM contracts with carriers, FEHBA instructs, "shall contain a detailed statement of benefits offered and shall include such maximums, limitations, exclusions, and other definitions of benefits as [OPM] considers necessary or desirable." § 8902(d). Pursuant to FEHBA, OPM entered into a contract in 1960 with the BCBSA to establish a nationwide fee-for-service health plan, the terms of which are renegotiated annually. As FEHBA prescribes, the Federal Government pays about 75% of the premiums; the enrollee pays the rest. § 8906(b). Premiums thus shared are deposited in a special Treasury Fund, the Federal Employees Health Benefits Fund, § 8909(a). Carriers draw against the Fund to pay for covered health-care benefits. *Ibid.;* see also 48 CFR § 1632.170(b) (2005).

The contract between OPM and the BCBSA provides: "By enrolling or accepting services under this contract, [enrollees and their eligible dependents] are obligated to all terms, conditions, and provisions of this contract." App. 90. An appended brochure sets out the benefits the carrier shall provide, see *id.*, at 89, and the carrier's subrogation and recovery rights, see *id.*, at 100. Each enrollee, as FEHBA directs, receives a statement of benefits conveying information about the Plan's coverage and conditions. 5 U. S. C. § 8907(b). Concerning reimbursement and subrogation, matters FEHBA itself does not address, the BCBSA Plan's statement of benefits reads in part:

> "If another person or entity . . . causes you to suffer an injury or illness, and if we pay benefits for that injury or illness, you must agree to the following:
>
> "All recoveries you obtain (whether by lawsuit, settlement, or otherwise), no matter how described or designated, must be used to reimburse us in full for benefits we paid. Our share of any recovery extends only to the amount of benefits we have paid or will pay to you or, if applicable, to your heirs, administrators, successors, or assignees.
>
> . . . . .

> "If you do not seek damages for your illness or injury, you must permit us to initiate recovery on your behalf (including the right to bring suit in your name). This is called subrogation.
>
> "If we pursue a recovery of the benefits we have paid, you must cooperate in doing what is reasonably necessary to assist us. You must not take any action that may prejudice our rights to recover." App. 165.[1]

If the participant does not voluntarily reimburse the Plan, the contract requires the carrier to make a "reasonable effort to seek recovery of amounts . . . it is entitled to recover in cases . . . brought to its attention." *Id.*, at 95, 125. Pursuant to the OPM–BCBSA master contract, reimbursements obtained by the carrier must be returned to the Treasury Fund. See *id.*, at 92, 118–119.

FEHBA contains a preemption provision, which originally provided:

> "The provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans to the extent that such law or regulation is inconsistent with such contractual provisions." 5 U. S. C. § 8902(m)(1) (1994 ed.).

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[1] The statement of benefits further provides:

"You must tell us promptly if you have a claim against another party for a condition that we have paid or may pay benefits for, and you must tell us about any recoveries you obtain, whether in or out of court. We may seek a lien on the proceeds of your claim in order to reimburse ourselves to the full amount of benefits we have paid or will pay.

"We may request that you assign to us (1) your right to bring an action or (2) your right to the proceeds of a claim for your illness or injury. We may delay processing of your claims until you provide the assignment.

"*Note:* We will pay the costs of any covered services you receive that are in excess of any recoveries made." App. 165.

To ensure uniform coverage and benefits under plans OPM negotiates for federal employees, see H. R. Rep. No. 95–282, p. 1 (1977), § 8902(m)(1) preempted "State laws or regulations which specify types of medical care, providers of care, extent of benefits, coverage of family members, age limits for family members, or other matters relating to health benefits or coverage," *id.*, at 4–5 (noting that some States mandated coverage for services not included in federal plans, for example, chiropractic services). In 1998, Congress amended § 8902(m)(1) by deleting the words "to the extent that such law or regulation is inconsistent with such contractual provisions." Thus, under § 8902(m)(1) as it now reads, state law—whether consistent or inconsistent with federal plan provisions—is displaced on matters of "coverage or benefits."

FEHBA contains but one provision addressed to federal-court jurisdiction. That provision vests in federal district courts "original jurisdiction, concurrent with the United States Court of Federal Claims, of a civil action or claim against the United States founded on this chapter." § 8912. The purpose of this provision—evident from its reference to the Court of Federal Claims—was to carve out an exception to the statutory rule that claims brought against the United States and exceeding $10,000 must originate in the Court of Federal Claims. See 28 U. S. C. § 1346(a)(2) (establishing district courts' jurisdiction, concurrent with the Court of Federal Claims, over claims against the United States that do not exceed $10,000); see also S. Rep. No. 1654, 83d Cong., 2d Sess., 4–5 (1954) (commenting, with respect to an identical provision in the Federal Employees' Group Life Insurance Act, 5 U. S. C. § 8715, that the provision "would extend the jurisdiction of United States district courts above the $10,000 limitation now in effect").

Under a 1995 OPM regulation, suits contesting final OPM action denying health benefits "must be brought against OPM and not against the carrier or carrier's subcontractors." 5 CFR § 890.107(c) (2005). While this regulation channels disputes over coverage or benefits into federal court by designating a United States agency (OPM) sole defendant, no law opens federal courts to carriers seeking reimbursement from beneficiaries or recovery from tortfeasors. Cf. 29 U. S. C. § 1132(e)(1) (provision of the Employee Retirement Income Security Act (ERISA) vesting in federal district courts "exclusive jurisdiction of civil actions under this subchapter"). And nothing in FEHBA's text prescribes a federal rule of decision for a carrier's claim against its insured or an alleged tortfeasor to share in the proceeds of a state-court tort action.

## II

Petitioner Empire HealthChoice Assurance, Inc., doing business as Empire Blue Cross Blue Shield (Empire), is the entity that administers the BCBSA Plan as it applies to federal employees in New York State. Respondent Denise Finn McVeigh (McVeigh) is the administrator of the estate of Joseph E. McVeigh (Decedent), a former enrollee in the Plan. The Decedent was injured in an accident in 1997. Plan payments for the medical care he received between 1997 and his death in 2001 amounted to $157,309. McVeigh, on behalf of herself, the Decedent, and a minor child, commenced tort litigation in state court against parties alleged to have caused Decedent's injuries. On learning that the parties to the state-court litigation had agreed to settle the tort claims, Empire sought to recover the $157,309 it had paid out for the Decedent's medical care.[2] Of the $3,175,000 for which the settlement provided, McVeigh, in response to Empire's asserted reimbursement right, agreed to place $100,000 in escrow.

Empire then filed suit in the United States District Court for the Southern District of New York, alleging that Mc-

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[2] At oral argument, counsel for respondent McVeigh represented that "most of the [reimbursement claims] are not of th[is] magnitude"; "[m]ost of the cases involve [amounts like] $5,500 and $6,500." Tr. of Oral Arg. 52.

Veigh was in breach of the reimbursement provision of the Plan. As relief, Empire demanded $157,309, with no offset for attorney's fees or other litigation costs McVeigh incurred in pursuing the state-court settlement. McVeigh moved to dismiss on various grounds, among them, lack of subject-matter jurisdiction. See 396 F. 3d 136, 139 (CA2 2005). Answering McVeigh's motion, Empire urged that the District Court had jurisdiction under 28 U. S. C. § 1331 because federal common law governed its reimbursement claim. In the alternative, Empire asserted that the Plan itself constituted federal law. See 396 F. 3d, at 140. The District Court rejected both arguments and granted McVeigh's motion to dismiss for want of subject-matter jurisdiction. *Ibid.*

A divided panel of the Court of Appeals for the Second Circuit affirmed, holding that "Empire's clai[m] arise[s] under state law." *Id.*, at 150. FEHBA's text, the court observed, contains no authorization for carriers "to vindicate [in federal court] their rights [against enrollees] under FEHBA-authorized contracts"; therefore, the court concluded, "federal jurisdiction exists over this dispute only if federal common law governs Empire's claims." *Id.*, at 140. Quoting *Boyle* v. *United Technologies Corp.*, 487 U. S. 500, 507, 508 (1988), the appeals court stated that courts may create federal common law only when "the operation of state law would (1) 'significant[ly] conflict' with (2) 'uniquely federal interest[s].'" 396 F. 3d, at 140.

Empire maintained that its contract-derived claim against McVeigh implicated "'uniquely federal interest[s],'" because (1) reimbursement directly affects the United States Treasury and the cost of providing health benefits to federal employees; and (2) Congress had expressed its interest in maintaining uniformity among the States on matters relating to federal health-plan benefits. *Id.*, at 141. The court acknowledged that the case involved distinctly federal interests, but found that Empire had not identified "specific ways in which the operation of state contract law, or indeed of other laws of general application, would conflict materially with the federal policies underlying FEHBA in the circumstances presented." *Id.*, at 150 (Sack, J., concurring); see *id.*, at 142.

The Court of Appeals next considered and rejected Empire's argument that FEHBA's preemption provision, 5 U. S. C. § 8902(m)(1), independently conferred federal jurisdiction. 396 F. 3d, at 145–149. That provision, the court observed, is "a limited preemption clause that the instant dispute does not trigger." *Id.*, at 145. Unlike § 8912, which "authoriz[es] federal jurisdiction over FEHBA-related . . . claims '*against the United States*,'" the court noted, § 8902(m)(1) "makes no reference to a federal right of action [in] or to federal jurisdiction [over]" the contract-derived reimbursement claim here at issue. 396 F. 3d, at 145, and n. 7.

Judge Raggi dissented. *Id.*, at 151. In her view, FEHBA's preemption provision, § 8902(m)(1), as amended in 1998, both calls for the application of uniform federal common law to terms in a FEHBA plan and establishes federal jurisdiction over Empire's complaint.

We granted certiorari, 546 U. S. 1085 (2005), to resolve a conflict among lower federal courts concerning the proper forum for claims of the kind Empire asserts. Compare *Blue Cross & Blue Shield of Ill.* v. *Cruz*, 396 F. 3d 793, 799–800 (CA7 2005) (upholding federal jurisdiction), *Caudill* v. *Blue Cross & Blue Shield of N. C.*, 999 F. 2d 74, 77 (CA4 1993) (same), and *Medcenters Health Care* v. *Ochs*, 854 F. Supp. 589, 593, and n. 3 (Minn. 1993) (same), aff'd, 26 F. 3d 865 (CA8 1994), with *Goepel* v. *National Postal Mail Handlers Union*, 36 F. 3d 306, 314–315 (CA3 1994) (rejecting federal jurisdiction), and 396 F. 3d, at 139 (decision below) (same).

## III

Title 28 U. S. C. § 1331 vests in federal district courts "original jurisdiction" over "all civil actions arising under the Constitution, laws, or treaties of the United States." A case "aris[es] under" federal law within the meaning of § 1331, this Court has said, if "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 27–28 (1983).

Empire and the United States, as *amicus curiae*, present two principal arguments in support of federal-question jurisdiction. Emphasizing our opinion in *Jackson Transit Authority* v. *Transit Union*, 457 U. S. 15, 22 (1982), and cases cited therein, they urge that Empire's complaint raises a federal claim because it seeks to vindicate a contractual right contemplated by a federal statute, a right that Congress intended to be federal in nature. See Brief for Petitioner 14–31; Brief for United States 12–23. FEHBA's preemption provision, Empire and the United States contend, demonstrates Congress' intent in this regard. The United States argues, alternatively, that there is federal jurisdiction here, as demonstrated by our recent decision in *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Mfg.*, 545 U. S. 308 (2005), because "federal law is a necessary element of [Empire's] claim." Brief for United States 25; accord Brief for Petitioner 41, n. 5. We address these arguments in turn. But first, we respond to the dissent's view that Empire and the United States have engaged in unnecessary labor, for *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943), provides "a basis for federal jurisdiction" in this case. *Post*, at 702.

### A

*Clearfield* is indeed a pathmarking precedent on the authority of federal courts to fashion uniform federal common law on issues of national concern. See Friendly, In Praise of *Erie*—and of the New Federal Common Law, 39 N. Y. U. L. Rev. 383, 409–410 (1964). But the dissent is mistaken in supposing that the *Clearfield* doctrine covers this case.

*Clearfield* was a suit by the United States to recover from a bank the amount paid on a Government check on which the payee's name had been forged. 318 U. S., at 365. Because the United States was the plaintiff, federal-court jurisdiction was solidly grounded. See *ibid.* ("This suit was instituted . . . by the United States . . . , the jurisdiction of the federal District Court being invoked pursuant to the provisions of § 24(1) of the Judicial Code, 28 U. S. C. § 41(1)," now contained in 28 U. S. C. §§ 1332, 1345, 1359). The case presented a vertical choice-of-law issue: Did state law under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), or a court-fashioned federal rule of decision (federal common law) determine the merits of the controversy? The Court held that "[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than [state] law." 318 U. S., at 366.

In post-*Clearfield* decisions, and with the benefit of enlightened commentary, see, *e. g.*, Friendly, *supra*, at 410, the Court has "made clear that uniform federal law need not be applied to all questions in federal government litigation, even in cases involving government contracts," R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 700 (5th ed. 2003) (hereinafter Hart and Wechsler).[3] "[T]he prudent course," we have recognized, is often "to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 740 (1979).

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[3] The United States, in accord with the dissent in this regard, see *post*, at 707, several times cites *United States* v. *County of Allegheny*, 322 U. S. 174 (1944), see, *e. g.*, Brief as *Amicus Curiae* 10, 15, 26, maintaining that the construction of a federal contract "necessarily present[s] questions of 'federal law not controlled by the law of any State,'" *id.*, at 26 (quoting 322 U. S., at 183). *Allegheny* does not stretch as widely as the United States suggests. That case concerned whether certain property belonged to the United States and, if so, whether the incidence of a state tax was on the United States or on a Government contractor. See *id.*, at 181–183, 186–189. Neither the United States nor any United States agency is a party to this case, and the auxiliary matter here involved scarcely resembles the controversy in *Allegheny*.

Later, in *Boyle*, the Court telescoped the appropriate inquiry, focusing it on the straightforward question whether the relevant federal interest warrants displacement of state law. See 487 U. S., at 507, n. 3. Referring simply to "the displacement of state law," the Court recognized that prior cases had treated discretely (1) the competence of federal courts to formulate a federal rule of decision, and (2) the appropriateness of declaring a federal rule rather than borrowing, incorporating, or adopting state law in point. The Court preferred "the more modest terminology," questioning whether "the distinction between displacement of state law and displacement of federal law's incorporation of state law ever makes a practical difference." *Ibid.* *Boyle* made two further observations here significant. First, *Boyle* explained, the involvement of "an area of uniquely federal interest . . . establishes a necessary, not a sufficient, condition for the displacement of state law." *Id.*, at 507. Second, in some cases, an "entire body of state law" may conflict with the federal interest and therefore require replacement. *Id.*, at 508. But in others, the conflict is confined, and "only particular elements of state law are superseded." *Ibid.*

The dissent describes this case as pervasively federal, *post*, at 702, and "the provisions . . . here [as] just a few scattered islands in a sea of federal contractual provisions," *post*, at 709. But there is nothing "scattered" about the provisions on reimbursement and subrogation in the OPM–BCBSA master contract. See *supra*, at 684–685. Those provisions are linked together and depend upon a recovery from a third party under terms and conditions ordinarily governed by state law. See *infra*, at 698.[4] The Court of

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[4] The dissent nowhere suggests that uniform, court-declared federal law would govern the carrier's subrogation claim against the tortfeasor. Nor does the dissent explain why the two linked provisions—reimbursement and subrogation—should be decoupled.

Appeals, whose decision we review, trained on the matter of reimbursement, not, as the dissent does, on FEHBA-authorized contracts at large. So focused, the appeals court determined that Empire has not demonstrated a "significant conflict . . . between an identifiable federal policy or interest and the operation of state law." 396 F. 3d, at 150 (Sack, J., concurring) (quoting *Boyle*, 487 U. S., at 507); see 396 F. 3d, at 140–141. Unless and until that showing is made, there is no cause to displace state law, much less to lodge this case in federal court.

### B

We take up next Empire's *Jackson Transit*-derived argument, which is, essentially, a more tailored variation of the theme sounded in the dissent. It is undisputed that Congress has not expressly created a federal right of action enabling insurance carriers like Empire to sue health-care beneficiaries in federal court to enforce reimbursement rights under contracts contemplated by FEHBA. Empire and the United States nevertheless argue that, under our 1982 opinion in *Jackson Transit*, Empire's claim for reimbursement, arising under the contract between OPM and the BCBSA, "states a federal claim" because Congress intended all rights and duties stemming from that contract to be "federal in nature." Brief for United States as *Amicus Curiae* 12; see Brief for Petitioner 18–29. We are not persuaded by this argument.

The reliance placed by Empire and the United States on *Jackson Transit* is surprising, for that decision held there was no federal jurisdiction over the claim in suit. The federal statute there involved, § 13(c) of the Urban Mass Transportation Act of 1964 (UMTA), 78 Stat. 307 (then codified at 49 U. S. C. § 1609(c) (1976 ed.)), conditioned a governmental unit's receipt of federal funds to acquire a privately owned transit company on preservation of collective-bargaining rights enjoyed by the acquired company's employees. 457 U. S., at 17–18. The city of Jackson, Tennessee, with federal financial assistance, acquired a failing private bus company and turned it into a public entity, the Jackson Transit Authority. *Id.*, at 18. To satisfy the condition on federal aid, the transit authority entered into a "§ 13(c) agreement" with the union that represented the private company's employees, and the Secretary of Labor certified that agreement as "fair and equitable." *Ibid.* (internal quotation marks omitted).

For several years thereafter, the transit authority covered its unionized workers in a series of collective-bargaining agreements. Eventually, however, the Authority notified the union that it would no longer adhere to collective-bargaining undertakings. *Id.*, at 19. The union commenced suit in federal court alleging breach of the § 13(c) agreement and of the latest collective-bargaining agreement. *Ibid.* This Court determined that the case did not arise under federal law, but was instead "governed by state law [to be] applied in state cour[t]." *Id.*, at 29.

The Court acknowledged in *Jackson Transit* that "on several occasions [we had] determined that a plaintiff stated a federal claim when he sued to vindicate contractual rights *set forth by federal statutes,* [even though] the relevant statutes lacked express provisions creating federal causes of action." *Id.*, at 22 (emphasis added) (citing *Machinists* v. *Central Airlines, Inc.*, 372 U. S. 682 (1963) (union had a federal right of action to enforce an airline-adjustment-board award included in a collective-bargaining contract pursuant to a provision of the Railway Labor Act); *Norfolk & Western R. Co.* v. *Nemitz,* 404 U. S. 37 (1971) (railroad's employees stated federal claims when they sought to enforce assurances made by the railroad to secure Interstate Commerce Commission approval of a consolidation under a provision of the Interstate Commerce Act); *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U. S. 11, 18–19 (1979) (permitting federal suit for rescission of a contract declared void by a provision of the Investment Advisers Act of 1940)). But prior decisions, we said, "d[id] not dictate the result in [the *Jackson Transit*] case," for in each case, "the critical factor" in determining "the scope of rights and remedies under a federal statute . . . is the congressional intent behind the particular provision at issue." 457 U. S., at 22.

"In some ways," the *Jackson Transit* Court said, the UMTA "seem[ed] to make § 13(c) agreements and collective-bargaining contracts creatures of federal law." *Id.*, at 23. In this regard, the Court noted, § 13(c)

> "demand[ed] 'fair and equitable arrangements' as prerequisites for federal aid; it require[d] the approval of the Secretary of Labor for those arrangements; it specifie[d] five different varieties of protective provisions that must be included among the § 13(c) arrangements; and it expressly incorporate[d] the protective arrangements into the grant contract between the recipient and the Federal Government." *Ibid.* (quoting 49 U. S. C. § 1609(c) (1976 ed.)).

But there were countervailing considerations. The Court observed that "labor relations between local governments and their employees are the subject of a longstanding statutory exemption from the National Labor Relations Act." 457 U. S., at 23. "Section 13(c)," the Court continued, "evince[d] no congressional intent to upset the decision in the [NLRA] to permit state law to govern the relationships between local governmental entities and the unions representing their employees." *Id.*, at 23–24. Legislative history was corroborative. "A consistent theme," the Court found, "[ran] throughout the consideration of § 13(c): Congress intended that labor relations between transit workers and local governments would be controlled by state law." *Id.*, at 24. We therefore held that the union had come to the wrong forum. Congress had indeed provided for § 13(c) agreements and collective-bargaining contracts stemming from them, but in the Court's judgment, the union's proper recourse for enforcement of those contracts was a suit in state court.

Measured against the Court's discussion in *Jackson Transit* about when a claim arises under federal law, Empire's contract-derived claim for reimbursement is not a "creatur[e] of federal law." *Id.*, at 23. True, distinctly federal interests are involved. Principally, reimbursements are credited to a federal fund, and the OPM–BCBSA master contract could be described as "federal in nature" because it is negotiated by a federal agency and concerns federal employees. See *supra*, at 683–684. But, as in *Jackson Transit*, countervailing considerations control. Among them, the reimbursement right in question, predicated on a FEHBA-authorized contract, is not a prescription of federal law. See *supra*, at 684. And, of prime importance, "Congress considered jurisdictional issues in enacting FEHBA[,] . . . confer[ring] federal jurisdiction where it found it necessary to do so." 396 F. 3d, at 145, n. 7.

FEHBA's jurisdictional provision, 5 U. S. C. § 8912, opens the federal district-court door to civil actions "against the United States." See *supra*, at 686. OPM's regulation, 5 CFR § 890.107(c) (2005), instructs enrollees who seek to challenge benefit denials to proceed in court against OPM "and not against the carrier or carrier's subcontractors." See *ibid.* Read together, these prescriptions "ensur[e] that suits brought by beneficiaries for denial of benefits will land in federal court." 396 F. 3d, at 145, n. 7. Had Congress found it necessary or proper to extend federal jurisdiction further, in particular, to encompass contract-derived reimbursement claims between carriers and insured workers, it would have been easy enough for Congress to say so. Cf. 29 U. S. C. § 1132(a)(3) (authorizing suit in federal court "by a participant, beneficiary, or fiduciary" of a pension or health plan governed by ERISA to gain redress for violations of "this subchapter or the terms of the plan"). We have no warrant to expand Congress' jurisdictional grant "by judicial decree." See *Kokkonen* v. *Guardian Life Ins. Co. of America*, 511 U. S. 375, 377 (1994).

*Jackson Transit,* Empire points out, referred to decisions "demonstrat[ing] that . . . private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes." 457 U. S., at 22. See Brief for Petitioner 15. This case, however, involves no right created by federal statute. As just reiterated, while the OPM–BCBSA master contract provides for reimbursement, FEHBA's text itself contains no provision addressing the reimbursement or subrogation rights of carriers.

Nor do we read 5 U. S. C. § 8902(m)(1), FEHBA's preemption prescription, see *supra,* at 685–686, as a jurisdiction-conferring provision. That choice-of-law prescription is unusual in that it renders preemptive contract terms in health insurance plans, not provisions enacted by Congress. See 396 F. 3d, at 143–145; *id.,* at 151 (Sack, J., concurring). A prescription of that unusual order warrants cautious interpretation.

Section 8902(m)(1) is a puzzling measure, open to more than one construction, and no prior decision seems to us precisely on point. Reading the reimbursement clause in the master OPM–BCBSA contract as a condition or limitation on "benefits" received by a federal employee, the clause could be ranked among "[contract] terms . . . relat[ing] to . . . coverage or benefits" and "payments with respect to benefits," thus falling within § 8902(m)(1)'s compass. See Brief for United States as *Amicus Curiae* 20; Reply Brief 8–9. On the other hand, a claim for reimbursement ordinarily arises long after "coverage" and "benefits" questions have been resolved, and corresponding "payments with respect to benefits" have been made to care providers or the insured. With that consideration in view, § 8902(m)(1)'s words may be read to refer to contract terms relating to the *beneficiary's* entitlement (or lack thereof) to Plan payment for certain health-care services he or she has received, and not to terms relating to the carrier's postpayments right to reimbursement. See Brief for Julia Cruz as *Amicus Curiae* 10, 11.

To decide this case, we need not choose between those plausible constructions. If contract-based reimbursement claims are not covered by FEHBA's preemption provision, then federal jurisdiction clearly does not exist. But even if FEHBA's preemption provision reaches contract-based reimbursement claims, that provision is not sufficiently broad to confer federal jurisdiction. If Congress intends a preemption instruction completely to displace ordinarily applicable state law, and to confer federal jurisdiction thereby, it may be expected to make that atypical intention clear. Cf. *Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U. S. 424, 432–433 (2002) (citing *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597, 605 (1991)). Congress has not done so here.

Section 8902(m)(1)'s text does not purport to render inoperative *any and all* state laws that in some way bear on federal employee-benefit plans. Cf. 29 U. S. C. § 1144(a) (portions of ERISA "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"). And, as just observed, see *supra*, at 697, given that § 8902(m)(1) declares no federal law preemptive, but instead, terms of an OPM–BCBSA negotiated contract, a modest reading of the provision is in order. Furthermore, a reimbursement right of the kind Empire here asserts stems from a personal-injury recovery, and the claim underlying that recovery is plainly governed by state law. We are not prepared to say, based on the presentations made in this case, that under § 8902(m)(1), an OPM–BCBSA contract term would displace every condition state law places on that recovery.

As earlier observed, the BCBSA Plan's statement of benefits links together the carrier's right to reimbursement from the insured and its right to subrogation. See *supra*, at 684–685. Empire's subrogation right allows the carrier, once it has paid an insured's medical expenses, to recover directly from a third party responsible for the insured's injury or illness. See 16 G. Couch, Cyclopedia of Insurance Law § 61:1 (2d ed. 1982). Had Empire taken that course, no access to a federal forum could have been predicated on the OPM–BCBSA contract right. The tortfeasors' liability, whether to the insured or the insurer, would be governed not by an agreement to which the tortfeasors are strangers, but by state law, and § 8902(m)(1) would have no sway.

In sum, the presentations before us fail to establish that § 8902(m)(1) leaves no room for any state law potentially bearing on federal employee-benefit plans in general, or carrier-reimbursement claims in particular. Accordingly, we extract from § 8902(m)(1) no prescription for federal-court jurisdiction.

### C

We turn finally to the argument that Empire's reimbursement claim, even if it does not qualify as a "cause of action created by federal law," nevertheless arises under federal law for § 1331 purposes, because federal law is "a necessary element of the [carrier's] claim for relief." Brief for United States as *Amicus Curiae* 25–26 (quoting *Grable*, 545 U. S., at 312, and *Jones* v. *R. R. Donnelley & Sons Co.*, 541 U. S. 369, 376 (2004)). This case, we are satisfied, does not fit within the special and small category in which the United States would place it. We first describe *Grable*, a recent decision that the United States identifies as exemplary,[5] and then explain why this case does not resemble that one.

*Grable* involved real property belonging to Grable & Sons Metal Products, Inc. (Grable), which the Internal Revenue Service (IRS) seized to satisfy a federal tax deficiency. 545 U. S., at 310. Grable received notice of the seizure by certified mail before the IRS sold the property to Darue Engineering & Manufacturing (Darue). *Ibid.* Five years later,

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[5] As the Court in *Grable* observed, 545 U. S., at 312, the classic example of federal-question jurisdiction predicated on the centrality of a federal issue is *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180 (1921).

Grable sued Darue in state court to quiet title. Grable asserted that Darue's record title was invalid because the IRS had conveyed the seizure notice improperly. *Id.*, at 311. The governing statute, 26 U. S. C. § 6335(a), provides that "notice in writing shall be given . . . to the owner of the property . . . or shall be left at his usual place of abode or business . . . ." Grable maintained that § 6335(a) required personal service, not service by certified mail. 545 U. S., at 311.

Darue removed the case to federal court. Alleging that Grable's claim of title depended on the interpretation of a federal statutory provision, *i. e.*, § 6335(a) of the Internal Revenue Code, Darue invoked federal-question jurisdiction under 28 U. S. C. § 1331. We affirmed lower court determinations that the removal was proper. "The meaning of the federal tax provision," we said, "is an important issue of federal law that sensibly belongs in a federal court." 545 U. S., at 315. Whether Grable received notice adequate under § 6335(a), we observed, was "an essential element of [Grable's] quiet title claim"; indeed, "it appear[ed] to be the only . . . issue contested in the case." *Ibid.*

This case is poles apart from *Grable.* Cf. Brief for United States as *Amicus Curiae* 27. The dispute there centered on the action of a federal agency (IRS) and its compatibility with a federal statute, the question qualified as "substantial," and its resolution was both dispositive of the case and would be controlling in numerous other cases. See 545 U. S., at 313. Here, the reimbursement claim was triggered, not by the action of any federal department, agency, or service, but by the settlement of a personal-injury action launched in state court, see *supra*, at 687–688, and the bottom-line practical issue is the share of that settlement properly payable to Empire.

*Grable* presented a nearly "pure issue of law," one "that could be settled once and for all and thereafter would govern numerous tax sale cases." Hart and Wechsler 65 (2005 Supp.). In contrast, Empire's reimbursement claim, Mc-

Veigh's counsel represented without contradiction, is fact-bound and situation-specific. McVeigh contends that there were overcharges or duplicative charges by care providers, and seeks to determine whether particular services were properly attributed to the injuries caused by the 1997 accident and not rendered for a reason unrelated to the accident. See Tr. of Oral Arg. 44, 53.

The United States observes that a claim for reimbursement may also involve as an issue "[the] extent, if any, to which the reimbursement should take account of attorney's fees expended . . . to obtain the tort recovery." Brief as *Amicus Curiae* 29. Indeed it may. But it is hardly apparent why a proper "federal-state balance," see *id.*, at 28, would place such a nonstatutory issue under the complete governance of federal law, to be declared in a federal forum. The state court in which the personal-injury suit was lodged is competent to apply federal law, to the extent it is relevant, and would seem best positioned to determine the lawyer's part in obtaining, and his or her fair share in, the tort recovery.

The United States no doubt "has an overwhelming interest in attracting able workers to the federal workforce," and "in the health and welfare of the federal workers upon whom it relies to carry out its functions." *Id.*, at 10. But those interests, we are persuaded, do not warrant turning into a discrete and costly "federal case" an insurer's contract-derived claim to be reimbursed from the proceeds of a federal worker's state-court-initiated tort litigation.

In sum, *Grable* emphasized that it takes more than a federal element "to open the 'arising under' door." 545 U. S., at 313. This case cannot be squeezed into the slim category *Grable* exemplifies.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Second Circuit is

*Affirmed.*

JUSTICE BREYER, with whom JUSTICE KENNEDY, JUSTICE SOUTER, and JUSTICE ALITO join, dissenting.

This case involves a dispute about the meaning of terms in a federal health insurance contract. The contract, between a federal agency and a private carrier, sets forth the details of a federal health insurance program created by federal statute and covering 8 million federal employees. In all this the Court cannot find a basis for federal jurisdiction. I believe I can. See *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943).

## I

### A

There is little about this case that is not federal. The comprehensive federal health insurance program at issue is created by a federal statute, the Federal Employees Health Benefits Act of 1959 (FEHBA), 5 U. S. C. § 8901 *et seq.* (2000 ed. and Supp. III). This program provides insurance for Federal Government employees and their families. That insurance program today covers approximately 8 million federal employees, retirees, and dependents, at a total cost to the Government of about $22 billion a year. Brief for United States as *Amicus Curiae* 2.

To implement the statute, the Office of Personnel Management (OPM), the relevant federal agency, enters into contracts with a handful of major insurance carriers. These agency/carrier contracts follow a standard agency form of about 38,000 words, and contain the details of the plan offered by the carrier. See § 8902(d) (2000 ed.) (requiring contract between carrier and agency to contain a detailed statement of the terms of the plan); see also Federal Employees Health Benefits Program Standard Contract (CR–2003) (2005), online at http://www.opm.gov/insure/carriers/samplecontract.doc (sample form agency/carrier contract) (as visited June 7, 2006, and available in Clerk of Court's case file). The contract lists, for example, the benefits provided to the employees who enroll. It provides a patient's bill of rights. It makes clear that the Government, not the carrier, will receive the premiums and will pay the benefits. It specifies that the carrier will administer the program that the contract sets forth, for which the carrier will receive an adjustable fee. The contract also states, "By enrolling or accepting services under this contract, [enrollees] are obligated to all terms, conditions, and provisions of this contract." App. 90.

As the statute requires, § 8907(b), the agency/carrier contract also provides that the carrier will send each enrolled employee a brochure that explains the terms of the plan, as set forth in the contract. The brochure explains that it "describes the benefits of the . . . [p]lan under [the carrier's] contract . . . with [the federal agency], as authorized by the [federal statute]." *Id.*, at 158. The terms of the brochure are incorporated into the agency/carrier contract. *Id.*, at 89. The carrier distributes the brochure with a seal attached to the front stating, "Authorized for distribution by the United States Office of Personnel Management Retirement and Insurance Service." *Id.*, at 155.

The program is largely funded by the Federal Government. More specifically, the Federal Government pays about 75% of the plan premiums; the enrollee pays the rest. § 8906(b). These premiums are deposited into a special fund in the United States Treasury. § 8909(a). The carrier typically withdraws money from the fund to pay for covered health care services, *ibid.;* however, the fund's money belongs, not to the carrier, but to the federal agency that administers the program. After benefits are paid, any surplus in the fund can be used at the agency's discretion to reduce premiums, to increase plan benefits, or to make a refund to the Government and enrollees. § 8909(b); 5 CFR § 890.503(c)(2) (2005). The carrier is not at risk. Rather, it earns a profit, not from any difference between plan premiums and the cost of benefits, but from a negotiated service charge that the federal agency pays directly.

Federal regulations provide that the federal agency will resolve disputes about an enrolled employee's coverage. § 890.105(a)(1); see also 5 U. S. C. § 8902(j) (requiring carrier to provide health benefit if OPM concludes that enrollee is entitled to the benefit under the contract). The agency's resolution is judicially reviewable under the Administrative Procedure Act in federal court. 5 CFR § 890.107 (2005).

In sum, the statute is federal, the program it creates is federal, the program's beneficiaries are federal employees working throughout the country, the Federal Government pays all relevant costs, and the Federal Government receives all relevant payments. The private carrier's only role in this scheme is to administer the health benefits plan for the federal agency in exchange for a fixed service charge.

## B

The plan at issue here, the Blue Cross Blue Shield Service Benefit Plan, is the largest in the statutory program. The plan's details are contained in Blue Cross Blue Shield's contract with the federal agency and in the brochure, which binds the enrolled employee to that contract. In this case, the carrier seeks to require the enrolled employee's estate to abide by provisions that permit the carrier to obtain (and require the enrolled employee to pay) reimbursement from an enrollee for benefits provided if the enrollee recovers money from a third party (as compensation for the relevant injury or illness). The parties dispute the proper application of some of those provisions.

First, the agency's contract with the carrier requires the carrier to "mak[e] a reasonable effort to seek recovery of amounts to which it is entitled to recover." App. 95. And the carrier must do so "under a single, nation-wide policy to ensure equitable and consistent treatment for all [enrollees] under this contract." *Ibid.* Any money recovered by the carrier goes into the statutory fund in the United States

Treasury, and may be spent for the benefit of the program at the discretion of the federal agency. See *supra*, at 703.

Second, the agency/carrier contract and the brochure set forth the enrollee's obligation to reimburse the carrier under certain circumstances. The contract states, "The Carrier may . . . recover directly from the [enrollee] all amounts received by the [enrollee] by suit, settlement, or otherwise from any third party or its insurer . . . for benefits which have also been paid under this contract." App. 95. The agency/carrier contract also says that the "[c]arrier's subrogation rights, procedures and policies, including recovery rights, shall be in accordance with the provisions of the agreed-upon brochure text." *Id.*, at 100. The relevant provisions in the brochure (which also appear in the appendix to the agency/carrier contract) tell the enrollee:

> "If another person or entity, through an act or omission, causes you to suffer an injury or illness, and if we pay benefits for that injury or illness, you must agree to the following:
>
> "All recoveries you obtain (whether by lawsuit, settlement, or otherwise), no matter how described or designated, must be used to reimburse us in full for benefits we paid. . . .
>
> "We will not reduce our share of any recovery unless we agree in writing to a reduction, . . . because you had to pay attorneys' fees." *Id.*, at 165.

The enrollee must abide by these requirements because, as explained above, the brochure tells the beneficiary that, by enrolling in the program, he or she is agreeing to the terms of the brochure, which in turn "describes the benefits of the [plan] under [the agency/carrier] contract." *Id.*, at 158.

## II

### A

I have explained the nature of the program and have set forth the terms of the agency/carrier contract in some detail because, once understood, their federal nature brings this case well within the scope of the relevant federal jurisdictional statute, 28 U. S. C. § 1331, which provides jurisdiction for claims "arising under" federal law. For purposes of this statute, a claim arises under federal law if federal law creates the cause of action. *Merrell Dow Pharmaceuticals Inc.* v. *Thompson,* 478 U. S. 804, 808 (1986); see also *American Well Works Co.* v. *Layne & Bowler Co.,* 241 U. S. 257, 260 (1916) (opinion of Holmes, J.) (A "suit arises under the law that creates the cause of action"). And this Court has explained that § 1331's "statutory grant of 'jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.'" *National Farmers Union Ins. Cos.* v. *Crow Tribe,* 471 U. S. 845, 850 (1985); see also *Illinois* v. *Milwaukee,* 406 U. S. 91 (1972); 19 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4514, p. 455 (2d ed. 1996) ("A case 'arising under' federal common law presents a federal question and as such is within the original subject-matter jurisdiction of the federal courts"). In other words, "[f]ederal common law as articulated in rules that are fashioned by court decisions are 'laws' as that term is used in § 1331." *National Farmers, supra,* at 850.

It seems clear to me that the petitioner's claim arises under federal common law. The dispute concerns the application of terms in a federal contract. This Court has consistently held that "obligations to and rights of the United States under its contracts are governed exclusively by federal law." *Boyle* v. *United Technologies Corp.,* 487 U. S. 500, 504 (1988). This principle dates back at least as far as *Clearfield Trust,* 318 U. S., at 366, where the Court held that the "rights and duties of the United States on [federal] commercial paper," namely a federal employee's paycheck, "are governed by federal rather than local law." The Court reasoned that "[w]hen the United States disburses its funds or pays its debts, it is exercising a constitutional function or power," a power "in no way dependent on the laws of Pennsylvania or of any other state." *Ibid.* Accordingly, "[i]n [the] absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law." *Id.*, at 367.

This Court has applied this principle, the principle embodied in *Clearfield Trust*, to Government contracts of all sorts. See, *e. g., West Virginia* v. *United States*, 479 U. S. 305, 308–309 (1987) (contract regarding federal disaster relief efforts); *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 726 (1979) (contractual liens arising from federal loan programs); *United States* v. *Little Lake Misere Land Co.*, 412 U. S. 580, 592 (1973) (agreements to acquire land under federal conservation program); *United States* v. *Seckinger*, 397 U. S. 203, 209 (1970) (Government construction contracts); *United States* v. *County of Allegheny*, 322 U. S. 174, 183 (1944) (Government procurement contracts).

In this case, the words that provide the right to recover are contained in the brochure, which in turn explains the provisions of the contract between the Government and the carrier, provisions that were written by a federal agency acting pursuant to a federal statute that creates a federal benefit program for federal employees. At bottom, then, the petitioner's claim is based on the interpretation of a federal contract, and as such should be governed by federal common law. And because the petitioner's claim is based on federal common law, the federal courts have jurisdiction over it pursuant to § 1331. The lower federal courts have similarly found § 1331 jurisdiction over suits between private parties based on Federal Government contracts. See, *e. g., Downey* v. *State Farm Fire & Casualty Co.*, 266 F. 3d 675, 680–681 (CA7 2001) (Easterbrook, J.) (National Flood Insurance Program contracts); *Almond* v. *Capital Properties, Inc.*, 212 F. 3d 20, 22–24 (CA1 2000) (Boudin, J.) (Federal Railroad Administration contract); *Price* v. *Pierce*, 823 F. 2d 1114, 1119–1120 (CA7 1987) (Posner, J.) (Dept. of Housing and Urban Development contracts).

### B

What might one say to the contrary? First, I may have made too absolute a statement in claiming that disputes arising under federal common law are (for jurisdictional purposes) cases "arising under" federal law. After all, in every Supreme Court case I have cited (except *National Farmers* and *Milwaukee*, and not including the Courts of Appeals cases), the United States was a party, and that fact provides an independent basis for jurisdiction. See 28 U. S. C. §§ 1345, 1346(a)(2), 1491(a)(1). In those cases the decision to apply federal common law was, therefore, a "choice-of-law issue" only, *ante*, at 691, and the Court consequently did not need to address the application of the *Clearfield Trust* doctrine to § 1331 "arising under" jurisdiction.

But I have found no case where a federal court concluded that federal common law governed a plaintiff's contract claim but nevertheless decided that the claim did not arise under federal law. I have found several lower court cases (cited *supra*, at 707 and this page) where courts asserted § 1331 jurisdiction solely on the basis of federal common law. And in *Machinists* v. *Central Airlines, Inc.*, 372 U. S. 682, 693, n. 17 (1963), this Court cited the *Clearfield Trust* cases in finding § 1331 jurisdiction over the contract suit before it, noting that although those cases "did not involve federal jurisdiction as such," nevertheless "they are suggestive" on the issue of § 1331 jurisdiction over suits involving Federal Government contracts "since they hold federal law determinative of the merits of the claim."

It is enough here, however, to assume that federal common law means federal jurisdiction where Congress so intends. Cf. *Clearfield Trust, supra*, at 367 ("*In absence of an applicable Act of Congress* it is for the federal courts to fashion the governing rule of law according to their own standards" (emphasis added)). If so, there are strong reasons for the federal courts, following *Clearfield Trust*, to assume jurisdiction and apply federal common law to resolve this case.

First, although the nominal plaintiff in this case is the carrier, the real party in interest is the United States. Any funds that the petitioner recovers here it must pay directly to the United States, by depositing those funds in the FEHBA United States Treasury account managed by the federal agency. The carrier simply administers the reimbursement proceeding for the United States, just as it administers the rest of the agency/carrier contract. Accordingly, this case, just like the *Clearfield Trust* cases, concerns the "rights of the United States under its contracts." *Boyle*, 487 U. S., at 504.

Second, the health insurance system FEHBA establishes is a federal program. The Federal Government pays for the benefits, receives the premiums, and resolves disputes over claims for medical services. Given this role, the Federal Government's need for uniform interpretation of the contract is great. Given the spread of Government employees throughout the Nation and the unfairness of treating similar employees differently, the employees' need for uniform interpretation is equally great. That interest in uniformity calls for application of federal common law to disputes about the meaning of the words in the agency/carrier contract and brochure. See *Clearfield Trust*, 318 U. S., at 367 (applying federal common law because the "desirability of a uniform [federal] rule is plain"); see also *Bank of America Nat. Trust & Sav. Assn.* v. *Parnell*, 352 U. S. 29, 33, 34 (1956) ("[L]itigation with respect to Government paper . . . between private parties" may nevertheless "be governed by federal [common] law" where there is "the presence of a federal interest"). And that interest in uniformity also suggests that the doors of the federal courts should be open to decide such disputes.

Third, as discussed above, the provisions at issue here are just a few scattered islands in a sea of federal contractual provisions, all of which federal courts will interpret and apply (when reviewing the federal agency's resolution of disputes regarding benefits). Given this context, why would Congress have wanted the courts to treat those islands any differently? I can find no convincing answer.

Regardless, the majority and the Court of Appeals believe they have come up with one possible indication of a contrary congressional intent. They believe that the statute's jurisdictional provision argues against federal jurisdiction where the United States is not formally a party. That provision gives the federal district courts "original jurisdiction, concurrent with the United States Court of Federal Claims, of a civil action or claim against the United States founded on this chapter." 5 U. S. C. § 8912. According to the majority, if Congress had wanted cases like this one to be brought in the federal courts, it would have extended § 8912 to cover them. *Ante*, at 696.

That is not so. Congress' failure to write § 8912 to include suits between carriers and enrollees over plan provisions may reflect inadvertence. Or it may reflect a belief that § 1331 covered such cases regardless. Either way, § 8912 tells us nothing about Congress' intent in respect to § 1331 jurisdiction.

But why then did Congress write § 8912 at all? After all, the cases there covered—contract claims against the Federal Government "founded on" the federal health insurance program—would also be governed by federal common law and (if my view is correct) would have fallen within the scope of § 1331. What need would there have been (if my view is correct) to write a special section, § 8912, expanding federal jurisdiction to encompass these claims?

The answer, as the majority itself points out, *ante*, at 686, is that Congress did not write § 8912 to expand the jurisdiction of the federal courts. It wrote that section to transfer a category of suits (claims against the United States exceeding $10,000) from one federal court (the Court of Federal Claims) to others (the federal district courts).

In sum, given *Clearfield Trust, supra,* and its progeny, there is every reason to believe that federal common law governs disputes concerning the agency/carrier contract. And that is so even though "it would have been easy enough for Congress to say" that federal common law should govern these claims. See *ante,* at 696. After all, no such express statement of congressional intent was present in *Clearfield Trust* itself, or in any of the cases relying on *Clearfield Trust* for the authority to apply federal common law to interpret Government contracts. See, *e. g.,* cases cited *supra,* at 707; see also *Clearfield Trust, supra,* at 367 ("In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards"). Accordingly, I would apply federal common law to resolve the petitioner's contract claim. And, as explained above, when the "governing rule of law" on which a claim is based is federal common law, then the federal courts have jurisdiction over that claim under § 1331.

### C

The Court adds that, in spite of the pervasively federal character of this dispute, state law should govern it because the petitioner has not demonstrated a " 'significant conflict . . . between an identifiable federal policy or interest and the operation of state law.' " *Ante,* at 693. But as I have explained, see *supra,* at 708–709, the Federal Government has two such interests: (1) the uniform operation of a federal employee health insurance program, and (2) obtaining reimbursement under a uniform set of legal rules. These interests are undermined if the amount a federal employee has to reimburse the FEHBA United States Treasury fund in cases like this one varies from State to State in accordance with state contract law. We have in the past recognized that this sort of interest in uniformity is sufficient to warrant application of federal common law. See, *e. g., Boyle, supra,* at 508 ("[W]here the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules"); *Kimbell Foods,* 440 U. S., at 728 ("Undoubtedly, federal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules"); *Clearfield Trust,* 318 U. S., at 367 (applying federal common law because "application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty" and "would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states," and therefore "[t]he desirability of a uniform rule is plain").

But even if the Court is correct that " '[t]he prudent course' " is " 'to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation,' " *ante,* at 691–692 (quoting *Kimbell Foods, supra,* at 740), there would still be federal jurisdiction over this case. That is because, as *Clearfield Trust, Kimbell Foods,* and other cases make clear, the decision to apply state law "as the *federal rule of decision*" is *itself* a matter of federal common law. See, *e. g., Kimbell Foods, supra,* at 728, n. 21 (" 'Whether state law is to be incorporated *as a matter of federal common law* . . . involves the . . . problem of the relationship of a particular issue to a going federal program' " (emphasis added)); *Clearfield Trust, supra,* at 367 ("In our choice of the *applicable federal rule* we have occasionally selected state law" (emphasis added)); see also R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 700 (5th ed. 2003) ("[T]he current approach, as reflected in *[Kimbell Foods, supra],* suggests that . . . while under *Clearfield* federal common law governs, in general it will incorporate state law as the rule of decision"); 19 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4518, at 572–573 ("In recent years, the Supreme Court has put increasing emphasis on the notion that *when determining what should be the con-*

*tent of federal common law, the law of the forum state should be adopted absent some good reason to displace it*" (emphasis added; citing *Kimbell Foods, supra,* and *Clearfield Trust, supra*)).

On this view, the *Clearfield Trust* inquiry involves two questions: (1) whether federal common law governs the plaintiff's claim; (2) if so, whether, *as a matter of federal common law,* the Court should adopt state law as the proper "'*federal* rule of decision,'" *ante,* at 692 (emphasis added). See, *e. g., Kimbell Foods, supra,* at 727 (deciding that "[f]ederal law therefore controls" the dispute but concluding that state law gives "content to this federal rule"); *United States* v. *Little Lake Misere Land Co.,* 412 U. S., at 593–594 (The "first step of the *Clearfield* analysis" is to decide whether "'the courts of the United States may formulate a rule of decision,'" and the "next step in our analysis is to determine whether" the federal rule of decision should "'borro[w]' state law"); see also Friendly, In Praise of *Erie*—and of the New Federal Common Law, 39 N. Y. U. L. Rev. 383, 410 (1964) ("*Clearfield* decided not one issue but two. The first . . . is that the right of the United States to recover for conversion of a Government check is a federal right, so that the courts of the United States may formulate a rule of decision. The second . . . is whether, having this opportunity, the federal courts should adopt a uniform nation-wide rule or should follow state law" (footnote omitted)). Therefore, even if the Court is correct that state law applies to claims involving the interpretation of some provisions of this contract, the decision whether and when to apply state law should be made by the federal courts under federal common law. Accordingly, for jurisdictional purposes those claims must still arise under federal law, for federal common law determines the rule of decision.

Finally, the footnote in *Boyle* cited by the Court did not purport to overrule *Clearfield Trust* on this point. See *Boyle,* 487 U. S., at 507, n. 3 ("If the distinction between displacement of state law and displacement of federal law's incorporation of state law ever makes a practical difference, it at least does not do so in the present case").

With respect, I dissent.

# RAPANOS ET AL. *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04–1034. Argued February 21, 2006—Decided June 19, 2006*

As relevant here, the Clean Water Act (CWA or Act) makes it unlawful to discharge dredged or fill material into "navigable waters" without a permit, 33 U. S. C. §§ 1311(a), 1342(a), and defines "navigable waters" as "the waters of the United States, including the territorial seas," § 1362(7). The Army Corps of Engineers (Corps), which issues permits for the discharge of dredged or fill material into navigable waters, interprets "the waters of the United States" expansively to include not only traditional navigable waters, 33 CFR § 328.3(a)(1), but also other defined waters, § 328.3(a)(2), (3); "[t]ributaries" of such waters, § 328.3(a)(5); and wetlands "adjacent" to such waters and tributaries, § 328.3(a)(7). "[A]djacent" wetlands include those "bordering, contiguous [to], or neighboring" waters of the United States even when they are "separated from [such] waters . . . by man-made dikes . . . and the like." § 328.3(c).

These cases involve four Michigan wetlands lying near ditches or man-made drains that eventually empty into traditional navigable waters. In No. 04–1034, the United States brought civil enforcement proceedings against the Rapanos petitioners, who had backfilled three of the areas without a permit. The District Court found federal jurisdiction over the wetlands because they were adjacent to "waters of the United States" and held petitioners liable for CWA violations. Affirming, the Sixth Circuit found federal jurisdiction based on the sites' hydrologic connections to the nearby ditches or drains, or to more remote navigable waters. In No. 04–1384, the Carabell petitioners were denied a permit to deposit fill in a wetland that was separated from a drainage ditch by an impermeable berm. The Carabells sued, but the District Court found federal jurisdiction over the site. Affirming, the Sixth Circuit held that the wetland was adjacent to navigable waters.

*Held:* The judgments are vacated, and the cases are remanded.

No. 04–1034, 376 F. 3d 629, and No. 04–1384, 391 F. 3d 704, vacated and remanded.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO, concluded:

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*Together with No. 04–1384, *Carabell et al.* v. *United States Army Corps of Engineers et al.*, also on certiorari to the same court.

1. The phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams," "oceans, rivers, [and] lakes," Webster's New International Dictionary 2882 (2d ed.), and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of that phrase is thus not "based on a permissible construction of the statute." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843. Pp. 730–739.

(a) While the meaning of "navigable waters" in the CWA is broader than the traditional definition found in *The Daniel Ball*, 10 Wall. 557, see *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers*, 531 U. S. 159, 167 *(SWANCC); United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121, 133, the CWA authorizes federal jurisdiction only over "waters." The use of the definite article "the" and the plural number "waters" show plainly that § 1362(7) does not refer to water in general, but more narrowly to water "[a]s found in streams," "oceans, rivers, [and] lakes," Webster's New International Dictionary 2882 (2d ed.). Those terms all connote relatively permanent bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Pp. 730–734.

(b) The Act's use of the traditional phrase "navigable waters" further confirms that the CWA confers jurisdiction only over relatively permanent bodies of water. Traditionally, such "waters" included only discrete bodies of water, and the term still carries some of its original substance, *SWANCC, supra*, at 172. This Court's subsequent interpretation of "the waters of the United States" in the CWA likewise confirms this limitation. See, *e. g., Riverside Bayview, supra*, at 131. And the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from "navigable waters," including them in the definition of "'point sources,'" 33 U. S. C. § 1362(14). Moreover, only the foregoing definition of "waters" is consistent with the CWA's stated policy "to recognize, preserve, and protect the primary responsibilities and rights of the States . . . to plan the development and use . . . of land and water resources . . . ." § 1251(b). In addition, "the waters of the United States" hardly qualifies as the clear and manifest statement from Congress needed to authorize intrusion into such an area of traditional state authority as land-use regulation; and to authorize federal action that stretches the limits of Congress's commerce power. See *SWANCC, supra*, at 173. Pp. 734–739.

2. A wetland may not be considered "adjacent to" remote "waters of the United States" based on a mere hydrologic connection. *Riverside*

*Bayview* rested on an inherent ambiguity in defining where the "water" ends and its abutting ("adjacent") wetlands begin, permitting the Corps to rely on ecological considerations only to resolve that ambiguity in favor of treating all abutting wetlands as waters. Isolated ponds are not "waters of the United States" in their own right, see *SWANCC, supra,* at 167, 171, and present no boundary-drawing problem justifying the invocation of such ecological factors. Thus, only those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between the two, are "adjacent" to such waters and covered by the Act. Establishing coverage of the Rapanos and Carabell sites requires finding that the adjacent channel contains a relatively permanent "wate[r] of the United States," and that each wetland has a continuous surface connection to that water, making it difficult to determine where the water ends and the wetland begins. Pp. 739–742.

3. Because the Sixth Circuit applied an incorrect standard to determine whether the wetlands at issue are covered "waters," and because of the paucity of the record, the cases are remanded for further proceedings. P. 757.

JUSTICE KENNEDY concluded that the Sixth Circuit correctly recognized that a water or wetland constitutes "navigable waters" under the Act if it possesses a "significant nexus" to waters that are navigable in fact or that could reasonably be so made, *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers,* 531 U. S. 159, 167, 172 *(SWANCC),* but did not consider all the factors necessary to determine that the lands in question had, or did not have, the requisite nexus. *United States* v. *Riverside Bayview Homes, Inc.,* 474 U. S. 121, and *SWANCC* establish the framework for the inquiry here. The nexus required must be assessed in terms of the Act's goals and purposes. Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U. S. C. § 1251(a), and it pursued that objective by restricting dumping and filling in "waters of the United States," §§ 1311(a), 1362(12). The rationale for the Act's wetlands regulation, as the Corps has recognized, is that wetlands can perform critical functions related to the integrity of other waters—such as pollutant trapping, flood control, and runoff storage. 33 CFR § 320.4(b)(2). Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense. When, in contrast, their effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the term "navigable waters." Because the Corps' theory of jurisdiction in these cases—adjacency to tributaries, however remote and insubstantial—goes beyond the *Riverside Bayview* holding, its assertion of jurisdiction cannot rest on that case. The breadth of the Corps' existing standard for tributaries—which seems to leave room for regulating drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes toward it—precludes that standard's adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Absent more specific regulations, the Corps must establish a significant nexus on a case-by-case basis when seeking to regulate wetlands based on adjacency to nonnavigable tributaries, in order to avoid unreasonable applications of the Act. In the instant cases the record contains evidence pointing to a possible significant nexus, but neither the agency nor the reviewing courts considered the issue in these terms. Thus, the cases should be remanded for further proceedings. Pp. 759–787.

SCALIA, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined. ROBERTS, C. J., filed a concurring opinion, *post,* p. 757. KENNEDY, J., filed an opinion concurring in the judgment, *post,* p. 759. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post,* p. 787. BREYER, J., filed a dissenting opinion, *post,* p. 811.

*M. Reed Hopper* argued the cause for petitioners in No. 04–1034. With him on the briefs was *Robin L. Rivett. Timothy A. Stoepker* argued the cause for petitioners in No. 04–1384. With him on the briefs were *Dennis W. Archer* and *Paul R. Bernard.*

*Solicitor General Clement* argued the cause for respondents in both cases. With him on the briefs were *Assistant Attorney General Wooldridge, Deputy Solicitor General Hungar, Malcolm L. Stewart, Greer S. Goldman, Ellen J. Durkee, Todd S. Kim,* and *Katherine W. Hazard.*†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the State of Alaska et al. by *David W. Márquez,* Attorney General of Alaska, and *Ruth Hamilton Heese* and *John T. Baker,* Assistant Attorneys General, *Roderick E. Walston, Mark Shurtleff,* Attorney General of Utah, *Guy R. Martin, Jeffrey Kightlinger, Thomas W. Birmingham,* and *Daniel*

JUSTICE SCALIA announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join.

In April 1989, petitioner John A. Rapanos backfilled wetlands on a parcel of land in Michigan that he owned and

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*S. Hentschke;* for the American Farm Bureau Federation by *Timothy S. Bishop;* for the American Petroleum Institute by *Thomas Sayre Llewellyn, Harry M. Ng,* and *Ralph J. Colleli, Jr.;* for the Attainable Housing Alliance by *Sebastian Rucci;* for the Cato Institute by *Timothy Lynch;* for the Claremont Institute Center for Constitutional Jurisprudence by *John C. Eastman* and *Edwin Meese III;* for CropLife America et al. by *Richard E. Schwartz;* for the Foundation for Environmental and Economic Progress et al. by *Virginia S. Albrecht, Deidre G. Duncan, David J. DePippo, Ralph W. Holmen, Robin S. Conrad,* and *Amar D. Sarwal;* for the Home Builders Association of Central Arizona by *Michael J. Pearce;* for the International Council of Shopping Centers et al. by *Gus Bauman;* for the Mountain States Legal Foundation by *William Perry Pendley;* for the National Association of Home Builders by *Duane J. Desiderio* and *Thomas J. Ward;* for the National Stone, Sand and Gravel Association et al. by *Lawrence R. Liebesman;* for Pulte Homes, Inc., et al. by *Carter G. Phillips* and *Stephen B. Kinnaird;* for the Western Coalition of Arid States by *Lawrence S. Bazel* and *John Briscoe;* for John J. Duncan, Jr., by *Thomas C. Jackson;* and for Charles R. Johnson et al. by *Michael E. Malamut, Andrew R. Grainger, Martin J. Newhouse,* and *Martin S. Kaufman.*

Briefs of *amici curiae* urging affirmance in both cases were filed for the State of New York et al. by *Eliot Spitzer,* Attorney General of New York, *Caitlin J. Halligan,* Solicitor General, *Peter H. Lehner, Daniel Smirlock,* Deputy Solicitor General, *Benjamin N. Gutman,* Assistant Solicitor General, and *Lemuel M. Srolovic,* Assistant Attorney General, *Michael A. Cox,* Attorney General of Michigan, *Thomas L. Casey,* Solicitor General, *Susan Shinkman,* and *Margaret O. Murphy,* and by the Attorneys General for their respective jurisdictions as follows: *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *Bill Lockyer* of California, *Richard Blumenthal* of Connecticut, *Carl C. Danberg* of Delaware, *Robert J. Spagnoletti* of the District of Columbia, *Charles J. Crist, Jr.,* of Florida, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Gregory D. Stumbo* of Kentucky, *Charles C. Foti, Jr.,* of Louisiana, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.,* of Maryland, *Thomas F. Reilly* of Massachusetts, *Mike Hatch* of Minnesota, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Kelly A. Ayotte* of New Hampshire, *Peter C. Harvey* of New Jersey, *Patri-*

sought to develop. This parcel included 54 acres of land with sometimes-saturated soil conditions. The nearest body of navigable water was 11 to 20 miles away. 339 F. 3d 447, 449 (CA6 2003) *(Rapanos I)*. Regulators had informed Mr. Rapanos that his saturated fields were "waters of the United States," 33 U. S. C. § 1362(7), that could not be filled

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*cia A. Madrid* of New Mexico, *Roy Cooper* of North Carolina, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Patrick Lynch* of Rhode Island, *Henry McMaster* of South Carolina, *Paul G. Summers* of Tennessee, *William H. Sorrell* of Vermont, *Rob McKenna* of Washington, and *Peggy A. Lautenschlager* of Wisconsin; for the City of New York by *Michael A. Cardozo, Leonard J. Koerner*, and *Hilary Meltzer;* for American Rivers et al. by *Howard I. Fox;* for the Association of State and Interstate Water Pollution Control Administrators by *Timothy J. Dowling;* for the Association of State Wetland Managers et al. by *Patrick Parenteau;* for the Chesapeake Bay Foundation by *Jan Goldman-Carter;* for Ducks Unlimited, Inc., et al. by *James Murphy, Thomas M. France*, and *Neil S. Kagan;* for the Environmental Law Institute by *Seth P. Waxman, Louis R. Cohen*, and *Leslie Carothers;* for the National Mitigation Banking Association by *Margaret N. Strand, John F. Cooney*, and *Royal C. Gardner;* for the Western Organization of Resource Councils et al. by *Charles M. Tebbutt;* for Carol M. Browner et al. by *Deborah A. Sivas, Lawrence C. Marshall*, and *Holly D. Gordon;* for Jared M. Diamond et al. by *Jason C. Rylander;* for Rep. John D. Dingell et al. by *Robert W. Adler* and *Amy J. Wildermuth;* and for Calvin H. Johnson by *Mr. Johnson, pro se.*

Briefs of *amici curiae* were filed in both cases for the American Planning Association by *Nancy Stroud;* for the Mackinac Center for Public Policy by *Patrick J. Wright;* for the National Association of Waterfront Employers by *Francis Edwin Froelich* and *Charles T. Carroll, Jr.;* and for the National Federation of Independent Business Legal Foundation by *Robert R. Gasaway* and *Ashley C. Parrish.*

*Mark A. Perry, Daniel J. Popeo*, and *Paul D. Kamenar* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging reversal in No. 04–1034.

*James Blanding Holman IV* and *Derb S. Carter, Jr.*, filed a brief for the Ecological Society of America et al. as *amici curiae* urging affirmance in No. 04–1384.

Briefs of *amici curiae* were filed in No. 04–1384 for Donald L. Harkins by *William J. Reisdorf;* and for Macomb County, Michigan, by *Mark A. Richardson.*

without a permit. Twelve years of criminal and civil litigation ensued.

The burden of federal regulation on those who would deposit fill material in locations denominated "waters of the United States" is not trivial. In deciding whether to grant or deny a permit, the U. S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as "economics," "aesthetics," "recreation," and "in general, the needs and welfare of the people," 33 CFR § 320.4(a) (2004).[1] The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes. Sunding & Zilberman, The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process, 42 Natural Resources J. 59, 74–76 (2002). "[O]ver $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits." *Id.*, at 81. These costs cannot be avoided, because the Clean Water Act "impose[s] criminal liability," as well as steep civil fines, "on a broad range of ordinary industrial and commercial activities." *Hanousek* v. *United States*, 528 U. S. 1102, 1103 (2000) (THOMAS, J., dissenting from denial of certiorari). In this litigation, for example, for backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines. See *United States* v. *Rapanos*, 235 F. 3d 256, 260 (CA6 2000).

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[1] In issuing permits, the Corps directs that "[a]ll factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people." § 320.4(a).

The enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations. In the last three decades, the Corps and the Environmental Protection Agency (EPA) have interpreted their jurisdiction over "the waters of the United States" to cover 270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States. And that was just the beginning. The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated "waters of the United States" include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years. Because they include the land containing storm sewers and desert washes, the statutory "waters of the United States" engulf entire cities and immense arid wastelands. In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a "water of the United States."

## I

Congress passed the Clean Water Act (CWA or Act) in 1972. The Act's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 86 Stat. 816, 33 U. S. C. § 1251(a). The Act also states that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." § 1251(b).

One of the statute's principal provisions is 33 U. S. C. § 1311(a), which provides that "the discharge of any pollutant by any person shall be unlawful." "The discharge of a pollutant" is defined broadly to include "any addition of any pollutant to navigable waters from any point source," § 1362(12), and "pollutant" is defined broadly to include not only traditional contaminants but also solids such as "dredged spoil, . . . rock, sand, [and] cellar dirt," § 1362(6). And, most relevant here, the CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." § 1362(7).

The Act also provides certain exceptions to its prohibition of "the discharge of any pollutant by any person." § 1311(a). Section 1342(a) authorizes the Administrator of the EPA to "issue a permit for the discharge of any pollutant, . . . notwithstanding section 1311(a) of this title." Section 1344 authorizes the Secretary of the Army, acting through the Corps, to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." § 1344(a), (d). It is the discharge of "dredged or fill material"—which, unlike traditional water pollutants, are solids that do not readily wash downstream—that we consider today.

For a century prior to the CWA, we had interpreted the phrase "navigable waters of the United States" in the Act's predecessor statutes to refer to interstate waters that are "navigable in fact" or readily susceptible of being rendered so. *The Daniel Ball*, 10 Wall. 557, 563 (1871); see also *United States* v. *Appalachian Elec. Power Co.*, 311 U. S. 377, 406 (1940). After passage of the CWA, the Corps initially adopted this traditional judicial definition for the Act's term "navigable waters." See 39 Fed. Reg. 12119, codified at 33 CFR § 209.120(d)(1) (1974); see also *Solid Waste Agency of*

*Northern Cook Cty.* v. *Army Corps of Engineers,* 531 U. S. 159, 168 (2001) *(SWANCC).* After a District Court enjoined these regulations as too narrow, *Natural Resources Defense Council, Inc.* v. *Callaway,* 392 F. Supp. 685, 686 (DC 1975), the Corps adopted a far broader definition. See 40 Fed. Reg. 31324–31325 (1975); 42 Fed. Reg. 37144 (1977). The Corps' new regulations deliberately sought to extend the definition of "the waters of the United States" to the outer limits of Congress's commerce power. See *id.*, at 37144, n. 2.

The Corps' current regulations interpret "the waters of the United States" to include, in addition to traditional interstate navigable waters, 33 CFR § 328.3(a)(1) (2004), "[a]ll interstate waters including interstate wetlands," § 328.3(a)(2); "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce," § 328.3(a)(3); "[t]ributaries of [such] waters," § 328.3(a)(5); and "[w]etlands adjacent to [such] waters [and tributaries] (other than waters that are themselves wetlands)," § 328.3(a)(7). The regulation defines "adjacent" wetlands as those "bordering, contiguous [to], or neighboring" waters of the United States. § 328.3(c). It specifically provides that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" *Ibid.*

We first addressed the proper interpretation of 33 U. S. C. § 1362(7)'s phrase "the waters of the United States" in *United States* v. *Riverside Bayview Homes, Inc.,* 474 U. S. 121 (1985). That case concerned a wetland that "was adjacent to a body of navigable water," because "the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to . . . a navigable waterway." *Id.,* at 131; see also 33 CFR § 328.3(b). Noting that "the transition from water to solid ground is not necessarily or even typically an abrupt one," and that "the Corps must necessarily choose some point at which water ends and land begins," 474 U. S., at 132, we upheld the Corps' interpretation of "the waters of the United States" to include wetlands that "actually abut[ted] on" traditional navigable waters. *Id.*, at 135.

Following our decision in *Riverside Bayview*, the Corps adopted increasingly broad interpretations of its own regulations under the Act. For example, in 1986, to "clarify" the reach of its jurisdiction, the Corps announced the so-called "Migratory Bird Rule," which purported to extend its jurisdiction to any intrastate waters "[w]hich are or would be used as habitat" by migratory birds. 51 Fed. Reg. 41217; see also *SWANCC*, *supra*, at 163–164. In addition, the Corps interpreted its own regulations to include "ephemeral streams" and "drainage ditches" as "tributaries" that are part of the "waters of the United States," see 33 CFR § 328.3(a)(5), provided that they have a perceptible "ordinary high water mark" as defined in § 328.3(e). 65 Fed. Reg. 12823 (2000). This interpretation extended "the waters of the United States" to virtually any land feature over which rainwater or drainage passes and leaves a visible mark—even if only "the presence of litter and debris." 33 CFR § 328.3(e). See also U. S. General Accounting Office, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Government Reform, House of Representatives, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, GAO–04–297, pp. 20–22 (Feb. 2004) (hereinafter GAO Report), http://www.gao.gov/new.items/d04297.pdf (all Internet materials as visited June 9, 2006, and available in Clerk of Court's case file). Prior to our decision in *SWANCC*, lower courts upheld the application of this expansive definition of "tributaries" to such entities as storm sewers that contained flow to covered waters during heavy rainfall, *United States* v. *Eidson*, 108

F. 3d 1336, 1340–1342 (CA11 1997), and dry arroyos connected to remote waters through the flow of groundwater over "centuries," *Quivira Mining Co.* v. *EPA,* 765 F. 2d 126, 129 (CA10 1985).

In *SWANCC,* we considered the application of the Corps' "Migratory Bird Rule" to "an abandoned sand and gravel pit in northern Illinois." 531 U. S., at 162. Observing that "[i]t was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview,*" *id.,* at 167 (emphasis added), we held that *Riverside Bayview* did not establish "that the jurisdiction of the Corps extends to ponds that are not adjacent to open water," 531 U. S., at 168 (emphasis deleted). On the contrary, we held that "nonnavigable, isolated, intrastate waters," *id.,* at 171—which, unlike the wetlands at issue in *Riverside Bayview,* did not "actually abu[t] on a navigable waterway," 531 U. S., at 167—were not included as "waters of the United States."

Following our decision in *SWANCC,* the Corps did not significantly revise its theory of federal jurisdiction under § 1344(a). The Corps provided notice of a proposed rulemaking in light of *SWANCC,* 68 Fed. Reg. 1991 (2003), but ultimately did not amend its published regulations. Because *SWANCC* did not directly address tributaries, the Corps notified its field staff that they "should continue to assert jurisdiction over traditional navigable waters . . . and, generally speaking, their tributary systems (and adjacent wetlands)." 68 Fed. Reg. 1998. In addition, because *SWANCC* did not overrule *Riverside Bayview,* the Corps continues to assert jurisdiction over waters " 'neighboring' " traditional navigable waters and their tributaries. 68 Fed. Reg. 1997 (quoting 33 CFR § 328.3(c) (2002)).

Even after *SWANCC,* the lower courts have continued to uphold the Corps' sweeping assertions of jurisdiction over ephemeral channels and drains as "tributaries." For example, courts have held that jurisdictional "tributaries" include the "intermittent flow of surface water through approximately 2.4 miles of natural streams and manmade ditches (paralleling and crossing under I–64)," *Treacy* v. *Newdunn Assoc.*, 344 F. 3d 407, 410 (CA4 2003); a "roadside ditch" whose water took "a winding, thirty-two-mile path to the Chesapeake Bay," *United States* v. *Deaton*, 332 F. 3d 698, 702 (CA4 2003); irrigation ditches and drains that intermittently connect to covered waters, *Community Assn. for Restoration of Environment* v. *Henry Bosma Dairy*, 305 F. 3d 943, 954–955 (CA9 2002); *Headwaters, Inc.* v. *Talent Irrigation Dist.*, 243 F. 3d 526, 534 (CA9 2001); and (most implausibly of all) the "washes and arroyos" of an "arid development site," located in the middle of the desert, through which "water courses . . . during periods of heavy rain," *Save Our Sonoran, Inc.* v. *Flowers*, 408 F. 3d 1113, 1118 (CA9 2005).[2]

These judicial constructions of "tributaries" are not outliers. Rather, they reflect the breadth of the Corps' determinations in the field. The Corps' enforcement practices vary somewhat from district to district because "the definitions used to make jurisdictional determinations" are deliberately left "vague." GAO Report 26; see also *id.*, at 22. But district offices of the Corps have treated, as "waters of the United States," such typically dry land features as "arroyos, coulees, and washes," as well as other "channels that might have little water flow in a given year." *Id.*, at 20–21. They have also applied that definition to such man-made, intermittently flowing features as "drain tiles, storm drains systems, and culverts." *Id.*, at 24 (footnote omitted).

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[2] We are indebted to the *Sonoran* court for a famous exchange, from the movie Casablanca (Warner Bros. 1942), which portrays most vividly the absurdity of finding the desert filled with waters:

"'Captain Renault [Claude Rains]: "What in heaven's name brought you to Casablanca?"

"'Rick [Humphrey Bogart]: "My health. I came to Casablanca for the waters."

"'Captain Renault: "The waters? What waters? We're in the desert."

"'Rick: "I was misinformed."'" 408 F. 3d, at 1117.

In addition to "tributaries," the Corps and the lower courts have also continued to define "adjacent" wetlands broadly after *SWANCC.* For example, some of the Corps' district offices have concluded that wetlands are "adjacent" to covered waters if they are hydrologically connected "through directional sheet flow during storm events," GAO Report 18, or if they lie within the "100-year floodplain" of a body of water—that is, they are connected to the navigable water by flooding, on average, once every 100 years, *id.*, at 17, and n. 16. Others have concluded that presence within 200 feet of a tributary automatically renders a wetland "adjacent" and jurisdictional. *Id.*, at 19. And the Corps has successfully defended such theories of "adjacency" in the courts, even after *SWANCC*'s excision of "isolated" waters and wetlands from the Act's coverage. One court has held since *SWANCC* that wetlands separated from flood control channels by 70-foot-wide berms, atop which ran maintenance roads, had a "significant nexus" to covered waters because, *inter alia*, they lay "within the 100 year floodplain of tidal waters." *Baccarat Fremont Developers, LLC* v. *Army Corps of Engineers*, 425 F. 3d 1150, 1152, 1157 (CA9 2005). In one of the cases before us today, the Sixth Circuit held, in agreement with "[t]he majority of courts," that "while a hydrological connection between the non-navigable and navigable waters is required, there is no 'direct abutment' requirement" under *SWANCC* for "'adjacency.'" 376 F. 3d 629, 639 (2004) *(Rapanos II).* And even the most insubstantial hydrologic connection may be held to constitute a "significant nexus." One court distinguished *SWANCC* on the ground that "a molecule of water residing in one of these pits or ponds [in *SWANCC*] could not mix with molecules from other bodies of water"—whereas, in the case before it, "water molecules currently present in the wetlands will inevitably flow towards and mix with water from connecting bodies," and "[a] drop of rainwater landing in the Site is certain to intermingle with water from the [nearby river]." *United States* v. *Rueth Development Co.*, 189 F. Supp. 2d 874, 877–878 (ND Ind. 2002).

## II

In these consolidated cases, we consider whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute "waters of the United States" within the meaning of the Act. Petitioners in No. 04–1034, the Rapanos and their affiliated businesses, deposited fill material without a permit into wetlands on three sites near Midland, Michigan: the "Salzburg site," the "Hines Road site," and the "Pine River site." The wetlands at the Salzburg site are connected to a man-made drain, which drains into Hoppler Creek, which flows into the Kawkawlin River, which empties into Saginaw Bay and Lake Huron. See Brief for United States in No. 04–1034, p. 11; 339 F. 3d, at 449. The wetlands at the Hines Road site are connected to something called the "Rose Drain," which has a surface connection to the Tittabawassee River. App. to Pet. for Cert. in No. 04–1034, pp. A23, B20. And the wetlands at the Pine River site have a surface connection to the Pine River, which flows into Lake Huron. *Id.*, at A23–A24, B26. It is not clear whether the connections between these wetlands and the nearby drains and ditches are continuous or intermittent, or whether the nearby drains and ditches contain continuous or merely occasional flows of water.

The United States brought civil enforcement proceedings against the Rapanos petitioners. The District Court found that the three described wetlands were "within federal jurisdiction" because they were " 'adjacent to other waters of the United States,' " and held petitioners liable for violations of the CWA at those sites. *Id.*, at B32–B35. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed, holding that there was federal jurisdiction over the wetlands at all three sites because "there were hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters." 376 F. 3d, at 643.

Petitioners in No. 04–1384, the Carabells, were denied a permit to deposit fill material in a wetland located on a triangular parcel of land about one mile from Lake St. Clair. A man-made drainage ditch runs along one side of the wetland, separated from it by a 4-foot-wide man-made berm. The berm is largely or entirely impermeable to water and blocks drainage from the wetland, though it may permit occasional overflow to the ditch. The ditch empties into another ditch or a drain, which connects to Auvase Creek, which empties into Lake St. Clair. See App. to Pet. for Cert. in No. 04–1384, pp. 2a–3a.

After exhausting administrative appeals, the Carabell petitioners filed suit in the District Court, challenging the exercise of federal regulatory jurisdiction over their site. The District Court ruled that there was federal jurisdiction because the wetland "is adjacent to neighboring tributaries of navigable waters and has a significant nexus to 'waters of the United States.'" *Id.*, at 49a. Again the Sixth Circuit affirmed, holding that the Carabell wetland was "adjacent" to navigable waters. 391 F. 3d 704, 708 (2004) *(Carabell).*

We granted certiorari and consolidated the cases, 546 U. S. 932 (2005), to decide whether these wetlands constitute "waters of the United States" under the Act, and if so, whether the Act is constitutional.

## III

The Rapanos petitioners contend that the terms "navigable waters" and "waters of the United States" in the Act must be limited to the traditional definition of *The Daniel Ball*, which required that the "waters" be navigable in fact, or susceptible of being rendered so. See 10 Wall., at 563. But this definition cannot be applied wholesale to the CWA. The Act uses the phrase "navigable waters" as a *defined* term, and the definition is simply "the waters of the United

States." 33 U. S. C. § 1362(7). Moreover, the Act provides, in certain circumstances, for the substitution of state for federal jurisdiction over "navigable waters . . . *other than* those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto." § 1344(g)(1) (emphasis added). This provision shows that the Act's term "navigable waters" includes something more than traditional navigable waters. We have twice stated that the meaning of "navigable waters" in the Act is broader than the traditional understanding of that term, *SWANCC*, 531 U. S., at 167; *Riverside Bayview*, 474 U. S., at 133.[3] We have also emphasized, however, that the qualifier "navigable" is not devoid of significance, *SWANCC*, *supra*, at 172.

We need not decide the precise extent to which the qualifiers "navigable" and "of the United States" restrict the coverage of the Act. Whatever the scope of these qualifiers, the CWA authorizes federal jurisdiction only over "waters." 33 U. S. C. § 1362(7). The only natural definition of the term "waters," our prior and subsequent judicial constructions of it, clear evidence from other provisions of the statute, and this Court's canons of construction all confirm that "the waters of the United States" in § 1362(7) cannot bear the expansive meaning that the Corps would give it.

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[3] One possibility, which we ultimately find unsatisfactory, is that the "other" waters covered by 33 U. S. C. § 1344(g)(1) are strictly *intrastate* waters that are traditionally navigable. But it would be unreasonable to interpret "the waters of the United States" to include all and only traditional navigable waters, both interstate and intrastate. This would preserve the traditional import of the qualifier "navigable" in the *defined* term "navigable waters," at the cost of depriving the qualifier "of the United States" *in the definition* of all meaning. As traditionally understood, the latter qualifier excludes intrastate waters, whether navigable or not. See *The Daniel Ball*, 10 Wall. 557, 563 (1871). In *SWANCC*, we held that "navigable" retained something of its traditional import. 531 U. S., at 172. *A fortiori*, the phrase "of the United States" in the definition retains some of its traditional meaning.

The Corps' expansive approach might be arguable if the CWA defined "navigable waters" as "water of the United States." But "the waters of the United States" is something else. The use of the definite article ("the") and the plural number ("waters") shows plainly that § 1362(7) does not refer to water in general. In this form, "the waters" refers more narrowly to water "[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes," or "the flowing or moving masses, as of waves or floods, making up such streams or bodies." Webster's New International Dictionary 2882 (2d ed. 1954) (hereinafter Webster's Second).[4] On this definition, "the waters of the United States" include only relatively permanent, standing or flowing bodies of water.[5] The definition refers to water

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[4] JUSTICE KENNEDY observes, *post,* at 770 (opinion concurring in judgment), that the dictionary approves an alternative, somewhat poetic usage of "waters" as connoting "[a] flood or inundation; as the *waters* have fallen. 'The peril of *waters,* wind, and rocks.' *Shak.*" Webster's Second 2882. It seems to us wholly unreasonable to interpret the statute as regulating only "floods" and "inundations" rather than traditional waterways—and strange to suppose that Congress had waxed Shakespearean in the definition section of an otherwise prosaic, indeed downright tedious, statute. The duller and more commonplace meaning is obviously intended.

[5] By describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day, continuously flowing stream postulated by JUSTICE STEVENS' dissent (hereinafter the dissent), *post,* at 800. Common sense and common usage distinguish between a wash and seasonal river.

Though scientifically precise distinctions between "perennial" and "intermittent" flows are no doubt available, see, *e. g.,* Dept. of Interior, U. S. Geological Survey, E. Hedman & W. Osterkamp, Streamflow Characteristics Related to Channel Geometry of Streams in Western United States 15 (1982) (Water-Supply Paper 2193), we have no occasion in this litigation to decide exactly when the drying-up of a streambed is continuous and frequent enough to disqualify the channel as a "wate[r] of the United as found in "streams," "oceans," "rivers," "lakes," and "bodies" of water "forming geographical features." *Ibid.* All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition's terms, namely, "streams," connotes a continuous flow of water in a permanent channel—especially when used in company with other terms such as "rivers," "lakes," and "oceans."[6] None of these terms encompasses transitory puddles or ephemeral flows of water.

The restriction of "the waters of the United States" to exclude channels containing merely intermittent or ephem-

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States." It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's "intermittent" and "ephemeral" streams, *post,* at 801—that is, streams whose flow is "[c]oming and going at intervals . . . [b]roken, fitful," Webster's Second 1296, or "existing only, or no longer than, a day; diurnal . . . short-lived," *id.*, at 857—are not.

[6] The principal definition of "stream" likewise includes reference to such permanent, geographically fixed bodies of water: "[a] current or course of water or other fluid, flowing on the earth, as a *river, brook, etc.*" *Id.*, at 2493 (emphasis added). The other definitions of "stream" repeatedly emphasize the requirement of *continuous* flow: "[a] *steady flow,* as of water, air, gas, or the like"; "[a]nything issuing or moving with *continued succession* of parts"; "[a] *continued current* or course; current; drift." *Ibid.* (emphasis added). The definition of the verb form of "stream" contains a similar emphasis on continuity: "[t]o issue or flow in a stream; to issue freely or move in a *continuous flow or course.*" *Ibid.* (emphasis added). On these definitions, therefore, the Corps' phrases "intermittent streams," 33 CFR § 328.3(a)(3) (2004), and "ephemeral streams," 65 Fed. Reg. 12823 (2000), are—like Senator Bentsen's "'flowing gullies,'" *post,* at 801, n. 11 (opinion of STEVENS, J.)—useful oxymora. Properly speaking, such entities constitute extant "streams" only while they are "continuous[ly] flow[ing]"; and the usually dry channels that contain them are never "streams." JUSTICE KENNEDY apparently concedes that "an intermittent flow can constitute a stream" only *"while it is flowing," post,* at 770 (emphasis added)—which would mean that the channel is a "water" covered by the Act only during those times when water flow actually occurs. But no one contends that federal jurisdiction appears and evaporates along with the water in such regularly dry channels.

eral flow also accords with the commonsense understanding of the term. In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, manmade drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction.

In addition, the Act's use of the traditional phrase "navigable waters" (the defined term) further confirms that it confers jurisdiction only over relatively *permanent* bodies of water. The Act adopted that traditional term from its predecessor statutes. See *SWANCC,* 531 U. S., at 180 (STEVENS, J., dissenting). On the traditional understanding, "navigable waters" included only discrete *bodies* of water. For example, in *The Daniel Ball,* we used the terms "waters" and "rivers" interchangeably. 10 Wall., at 563. And in *Appalachian Electric,* we consistently referred to the "navigable waters" as "waterways." 311 U. S., at 407–409. Plainly, because such "waters" had to be navigable in fact or susceptible of being rendered so, the term did not include ephemeral flows. As we noted in *SWANCC,* the traditional term "navigable waters"—even though defined as "the waters of the United States"—carries *some* of its original substance: "[I]t is one thing to give a word limited effect and quite another to give it no effect whatever." 531 U. S., at 172. That limited effect includes, at bare minimum, the ordinary presence of water.

Our subsequent interpretation of the phrase "the waters of the United States" in the CWA likewise confirms this limitation of its scope. In *Riverside Bayview,* we stated that the phrase in the Act referred primarily to "rivers, streams, and other *hydrographic features more conventionally identifiable as 'waters'* " than the wetlands adjacent to such features. 474 U. S., at 131 (emphasis added). We thus echoed the dictionary definition of "waters" as referring to "streams and bodies *forming geographical features* such as oceans, rivers, [and] lakes." Webster's Second 2882 (emphasis added). Though we upheld in that case the inclusion of wetlands abutting such a "hydrographic featur[e]"—principally due to the difficulty of drawing any clear boundary between the two, see 474 U. S., at 132; Part IV, *infra*—nowhere did we suggest that "the waters of the United States" should be expanded to include, in their own right, entities other than "hydrographic features more conventionally identifiable as 'waters,'" *id.*, at 131. Likewise, in both *Riverside Bayview* and *SWANCC*, we repeatedly described the "navigable waters" covered by the Act as "open water" and "open waters." See *Riverside Bayview, supra,* at 132, and n. 8, 134; *SWANCC, supra,* at 167, 172. Under no rational interpretation are typically dry channels described as "*open* waters."

Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from "navigable waters," by including them in the definition of "'point source.'" The Act defines "'point source'" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U. S. C. § 1362(14). It also defines "'discharge of a pollutant'" as "any addition of any pollutant *to* navigable waters *from* any point source." § 1362(12)(A) (emphasis added). The definitions thus conceive of "point sources" and "navigable waters" as separate and distinct categories. The definition of "discharge" would make little sense if the two categories were significantly overlapping. The separate classification of "ditch[es], channel[s], and conduit[s]"—which are terms ordinarily used to describe the watercourses through which *intermittent* waters typically flow—shows that these are, by and large, *not* "waters of the United States."[7]

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[7] It is of course true, as the dissent and JUSTICE KENNEDY both observe, that ditches, channels, conduits and the like "can all hold water permanently as well as intermittently," *post*, at 802 (opinion of STEVENS, J.); see also *post*, at 771–772 (opinion of KENNEDY, J.). But when they do, we usually refer to them as "rivers," "creeks," or "streams." A permanently flooded ditch around a castle is technically a "ditch," but (because it is permanently filled with water) we normally describe it as a "moat." See Webster's Second 1575. And a permanently flooded man-made ditch used for navigation is normally described, not as a "ditch," but as a "canal." See *id.*, at 388. Likewise, an open channel through which water permanently flows is ordinarily described as a "stream," not as a "channel," because of the continuous presence of water. This distinction is particularly apt in the context of a statute regulating *water* quality, rather than (for example) the shape of streambeds. Cf. *Jennison* v. *Kirk*, 98 U. S. 453, 454–456 (1879) (referring to man-made channels as "ditches" when the alleged injury arose from physical damage to the *banks* of the ditch); *PUD No. 1 of Jefferson Cty.* v. *Washington Dept. of Ecology*, 511 U. S. 700, 709 (1994) (referring to a water-filled tube as a "tunnel" in order to describe the *shape* of the conveyance, not the fact that it was water-filled), both cited *post*, at 802, n. 12 (opinion of STEVENS, J.). On its only natural reading, such a statute that treats "waters" separately from "ditch[es], channel[s], tunnel[s], and conduit[s]," thereby distinguishes between continuously flowing "waters" and channels containing only an occasional or intermittent flow.

It is also true that highly artificial, manufactured, enclosed conveyance systems—such as "sewage treatment plants," *post*, at 772 (opinion of KENNEDY, J.), and the "mains, pipes, hydrants, machinery, buildings, and other appurtenances and incidents" of the city of Knoxville's "system of waterworks," *Knoxville Water Co.* v. *Knoxville*, 200 U. S. 22, 27 (1906), cited *post*, at 802, n. 12 (opinion of STEVENS, J.)—likely do not qualify as "waters of the United States," despite the fact that they may contain continuous flows of water. See *post*, at 772 (opinion of KENNEDY, J.); *post*, at 802, n. 12 (opinion of STEVENS, J.). But this does not contradict our interpretation, which asserts that relatively continuous flow is a *necessary* condition for qualification as a "water," not an *adequate* condition. Just as ordinary usage does not treat typically dry beds as "waters," so also it

Moreover, only the foregoing definition of "waters" is consistent with the CWA's stated "policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ." § 1251(b). This statement of policy was included in the Act as enacted in 1972, see 86 Stat. 816, prior to the addition of the optional state administration program in the 1977 amendments, see 91 Stat. 1601. Thus the policy plainly referred to something beyond the subsequently added state administration program of 33 U. S. C. § 1344(g)–(*l*). But the expansive theory advanced by the Corps, rather than "preserv[ing] the primary rights and responsibilities of the States," would have brought virtually all "plan[ning of] the development and use . . . of land and water resources" by the States under federal control. It is therefore an unlikely reading of the phrase "the waters of the United States."[8]

Even if the phrase "the waters of the United States" were ambiguous as applied to intermittent flows, our own canons of construction would establish that the Corps' interpretation of the statute is impermissible. As we noted in

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does not treat such elaborate, man-made, enclosed systems as "waters" on a par with "streams," "rivers," and "oceans."

[8] JUSTICE KENNEDY contends that the Corps' preservation of the "responsibilities and rights" of the States is adequately demonstrated by the fact that "33 States plus the District of Columbia have filed an *amici* brief in this litigation" in favor of the Corps' interpretation, *post*, at 777. But it makes no difference to the *statute's* stated purpose of preserving States' "responsibilities and rights," § 1251(b), that some States wish to unburden themselves of them. Legislative and executive officers of the States may be content to leave "responsibilit[y]" with the Corps because it is attractive to shift to another entity controversial decisions disputed between politically powerful, rival interests. That, however, is not what the statute provides.

*SWANCC,* the Government's expansive interpretation would "result in a significant impingement of the States' traditional and primary power over land and water use." 531 U. S., at 174. Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power. See *FERC* v. *Mississippi,* 456 U. S. 742, 767–768, n. 30 (1982); *Hess* v. *Port Authority Trans-Hudson Corporation,* 513 U. S. 30, 44 (1994). The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board. See 33 CFR § 320.4(a)(1) (2004). We ordinarily expect a "clear and manifest" statement from Congress to authorize an unprecedented intrusion into traditional state authority. See *BFP* v. *Resolution Trust Corporation,* 511 U. S. 531, 544 (1994). The phrase "the waters of the United States" hardly qualifies.

Likewise, just as we noted in *SWANCC,* the Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power. See 531 U. S., at 173. (In developing the current regulations, the Corps consciously sought to extend its authority to the farthest reaches of the commerce power. See 42 Fed. Reg. 37127 (1977).) Even if the term "the waters of the United States" were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council,* 485 U. S. 568, 575 (1988).[9]

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[9] JUSTICE KENNEDY objects that our reliance on these two clear-statement rules is inappropriate because "the plurality's interpretation does not fit the avoidance concerns that it raises," *post,* at 776—that is,

In sum, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of the "the waters of the United States" is thus not "based on a permissible construction of the statute." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984).

## IV

In *Carabell*, the Sixth Circuit held that the nearby ditch constituted a "tributary" and thus a "water of the United States" under 33 CFR § 328.3(a)(5). See 391 F. 3d, at 708–709. Likewise in *Rapanos II*, the Sixth Circuit held that the nearby ditches were "tributaries" under § 328.3(a)(5). 376 F. 3d, at 643. But *Rapanos II* also stated that, even if the ditches were not "waters of the United States," the wetlands were "adjacent" to *remote* traditional navigable waters in virtue of the wetlands' "hydrological connection" to them. See *id.*, at 639–640. This statement reflects the practice of

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because our resolution both eliminates some jurisdiction that is clearly constitutional and traditionally federal, and retains some that is questionably constitutional and traditionally local. But a clear-statement rule can carry one only so far as the statutory text permits. Our resolution, unlike JUSTICE KENNEDY's, keeps both the overinclusion and the underinclusion to the minimum consistent with the statutory text. JUSTICE KENNEDY's reading—despite disregarding the text—fares no better than ours as a precise "fit" for the "avoidance concerns" that he also acknowledges. He admits, *post*, at 782, that "the significant-nexus requirement may not align perfectly with the traditional extent of federal authority" over navigable waters—an admission that "tests the limits of understatement," *Gonzales* v. *Oregon*, 546 U. S. 243, 286 (2006) (SCALIA, J., dissenting)—and it aligns even worse with the preservation of traditional state land-use regulation.

the Corps' district offices, which may "assert jurisdiction over a wetland without regulating the ditch connecting it to a water of the United States." GAO Report 23. We therefore address in this Part whether a wetland may be considered "adjacent to" remote "waters of the United States," because of a mere hydrologic connection to them.

In *Riverside Bayview,* we noted the textual difficulty in including "wetlands" as a subset of "waters": "On a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.'" 474 U. S., at 132. We acknowledged, however, that there was an inherent ambiguity in drawing the boundaries of any "waters":

> "[T]he Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious." *Ibid.*

Because of this inherent ambiguity, we deferred to the agency's inclusion of wetlands "actually abut[ting]" traditional navigable waters: "Faced with such a problem of defining the bounds of its regulatory authority," we held, the agency could reasonably conclude that a wetland that "adjoin[ed]" waters of the United States is itself a part of those waters. *Id.,* at 132, 135, and n. 9. The difficulty of delineating the boundary between water and land was central to our reasoning in the case: "In view of the breadth of federal regulatory authority contemplated by the Act itself and *the inherent difficulties of defining precise bounds to regulable waters,* the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." *Id.*, at 134 (emphasis added).[10]

When we characterized the holding of *Riverside Bayview* in *SWANCC*, we referred to the close connection between waters and the wetlands that they gradually blend into: "It was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." 531 U. S., at 167 (emphasis added). In particular, *SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview*—and upon which the dissent repeatedly relies today, see *post*, at 796, 797–798, 798–799, 800, 803, 806, 807, 809–810—provided an *independent* basis for including entities like "wetlands" (or "ephemeral streams") within the phrase "the waters of the United States." *SWANCC* found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction. It thus confirmed that *Riverside Bayview* rested upon the inherent ambiguity in defining where water ends and abutting ("adjacent") wetlands begin, permitting the Corps' reliance on ecological considerations *only to resolve that ambiguity* in favor of treating all abutting wetlands as waters. Isolated ponds were not "waters of the United States" in their own right, see 531 U. S., at 167, 171, and presented no boundary-drawing problem that would have justified the invocation of ecological factors to treat them as such.

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[10] Since the wetlands at issue in *Riverside Bayview* actually abutted waters of the United States, the case could not possibly have held that merely "neighboring" wetlands came within the Corps' jurisdiction. *Obiter* approval of that proposition might be inferred, however, from the opinion's quotation without comment of a statement by the Corps describing covered "adjacent" wetlands as those " 'that form the border of *or are in reasonable proximity to* other waters of the United States.' " 474 U. S., at 134 (quoting 42 Fed. Reg. 37128 (1977); emphasis added). The opinion immediately reiterated, however, that adjacent wetlands could be regarded as "the waters of the United States" in view of "the inherent difficulties of defining precise bounds to regulable waters," 474 U. S., at 134—a rationale that would have no application to physically separated "neighboring" wetlands. Given that the wetlands at issue in *Riverside Bayview* themselves "actually abut[ted] on a navigable waterway," *id.*, at 135; given that our opinion recognized that unconnected wetlands could not naturally be characterized as " 'waters' " at all, *id.*, at 132; and given the repeated reference to the difficulty of determining where waters end and wetlands begin; the most natural reading of the opinion is that a wetlands' mere "reasonable proximity" to waters of the United States is not enough to confer Corps jurisdiction. In any event, as discussed in our immediately following text, any possible ambiguity has been eliminated by *SWANCC*, 531 U. S. 159 (2001).

Therefore, *only* those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands, are "adjacent to" such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to "waters of the United States" do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a "significant nexus" in *SWANCC*. 531 U. S., at 167. Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: first, that the adjacent channel contains a "wate[r] of the United States," (*i. e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.

## V

Respondents and their *amici* urge that such restrictions on the scope of "navigable waters" will frustrate enforcement against traditional water polluters under 33 U. S. C. §§ 1311 and 1342. Because the same definition of "navigable waters" applies to the entire statute, respondents contend that water polluters will be able to evade the permitting requirement of § 1342(a) simply by discharging their pollutants into noncovered intermittent watercourses that lie upstream of covered waters. See Tr. of Oral Arg. 74–75.

That is not so. Though we do not decide this issue, there is no reason to suppose that our construction today significantly affects the enforcement of § 1342, inasmuch as lower courts applying § 1342 have not characterized intermittent channels as "waters of the United States." The Act does not forbid the "addition of any pollutant *directly* to navigable waters from any point source," but rather the "addition of any pollutant *to* navigable waters." § 1362(12)(A) (emphasis added); § 1311(a). Thus, from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between. *United States* v. *Velsicol Chemical Corp.*, 438 F. Supp. 945, 946–947 (WD Tenn. 1976) (a municipal sewer system separated the "point source" and covered navigable waters). See also *Sierra Club* v. *El Paso Gold Mines, Inc.*, 421 F. 3d 1133, 1137, 1141 (CA10 2005) (2.5 miles of tunnel separated the "point source" and "navigable waters").

In fact, many courts have held that such upstream, intermittently flowing channels themselves constitute "point sources" under the Act. The definition of "point source" includes "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U. S. C. § 1362(14). We have held that the Act "makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'" *South Fla. Water Management Dist.* v. *Miccosukee Tribe*, 541 U. S. 95, 105 (2004). Cases holding the intervening channel to be a point source include *United States* v. *Ortiz*, 427 F. 3d 1278, 1281 (CA10 2005) (a storm drain that carried flushed chemicals from a toilet to the Colorado River was a "point source"), and *Dague* v. *Burlington*, 935 F. 2d 1343, 1354–1355 (CA2 1991) (a culvert connecting two bodies of navigable water was a "point source"), rev'd on other grounds, 505 U. S. 557 (1992). Some courts have even adopted both the "indirect discharge" rationale and the "point source" rationale in the alternative, applied to the same facts. See, *e. g., Concerned Area Residents for Environment* v. *Southview Farm*, 34 F. 3d 114, 118–119 (CA2 1994). On either view, however, the lower courts have seen no need to classify the intervening conduits as "waters of the United States."

In contrast to the pollutants normally covered by the permitting requirement of § 1342(a), "dredged or fill material," which is typically deposited for the sole purpose of staying put, does not normally wash downstream,[11] and thus does not normally constitute an "addition . . . to navigable waters" when deposited in upstream isolated wetlands. §§ 1344(a),

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[11] The dissent argues that "the very existence of words like 'alluvium' and 'silt' in our language suggests that at least some [dredged or fill material] makes its way downstream," *post*, at 807 (citation omitted). See also *post*, at 774–775 (opinion of KENNEDY, J.). By contrast, *amici* cite multiple empirical analyses that contradict the dissent's philological approach to sediment erosion—including one which concludes that "[t]he idea that the discharge of dredged or fill material into isolated waters, ephemeral drains or non-tidal ditches will pollute navigable waters located any appreciable distance from them lacks credibility." R. Pierce, Technical Principles Related to Establishing the Limits of Jurisdiction for Section 404 of the Clean Water Act 34–40 (Apr. 2003), available at http://www.wetlandtraining.com/tpreljscwa.pdf, cited in Brief for International Council of Shopping Centers et al. as *Amici Curiae* 26–27; Brief for Pulte Homes, Inc., et al. as *Amici Curiae* 20–21; Brief for Foundation for Environmental and Economic Progress et al. as *Amici Curiae* 29, and n. 53 ("Fill material does not migrate"). Such scientific analysis is entirely unnecessary, however, to reach the unremarkable conclusion that the deposit of *mobile* pollutants into upstream ephemeral channels is naturally described as an "addition . . . to navigable waters," 33 U. S. C. § 1362(12), while the deposit of *stationary* fill material generally is not.

1362(12). The Act recognizes this distinction by providing a separate permitting program for such discharges in § 1344(a). It does not appear, therefore, that the interpretation we adopt today significantly reduces the scope of § 1342.

Respondents also urge that the narrower interpretation of "waters" will impose a more difficult burden of proof in enforcement proceedings under §§ 1311(a) and 1342(a), by requiring the agency to demonstrate the downstream flow of the pollutant along the intermittent channel to traditional "waters." See Tr. of Oral Arg. 57. But, as noted above, the lower courts do not generally rely on characterization of intervening channels as "waters of the United States" in applying § 1311 to the traditional pollutants subject to § 1342. Moreover, the proof of downstream flow of pollutants required under § 1342 appears substantially similar, if not identical, to the proof of a hydrologic connection that would be required, on the Sixth Circuit's theory of jurisdiction, to prove that an upstream channel or wetland is a "wate[r] of the United States." See *Rapanos II*, 376 F. 3d, at 639. Compare, *e. g.*, App. to Pet. for Cert. in No. 04–1034, at B11, B20, B26 (testimony of hydrologic connections based on observation of surface water connections), with *Southview Farm, supra*, at 118–121 (testimony of discharges based on observation of the flow of polluted water). In either case, the agency must prove that the contaminant-laden waters ultimately reach covered waters.

Finally, respondents and many *amici* admonish that narrowing the definition of "the waters of the United States" will hamper federal efforts to preserve the Nation's wetlands. It is not clear that the state and local conservation efforts that the CWA explicitly calls for, see 33 U. S. C. § 1251(b), are in any way inadequate for the goal of preservation. In any event, a Comprehensive National Wetlands Protection Act is not before us, and the "wis[dom]" of such a statute, *post*, at 805 (opinion of STEVENS, J.), is beyond our ken. What is clear, however, is that Congress did not enact one when it granted the Corps jurisdiction over only "the *waters* of the United States."

## VI

In an opinion long on praise of environmental protection and notably short on analysis of the statutory text and structure, the dissent would hold that "the waters of the United States" include any wetlands "adjacent" (no matter how broadly defined) to "tributaries" (again, no matter how broadly defined) of traditional navigable waters. For legal support of its policy-laden conclusion, the dissent relies exclusively on two sources: "[o]ur unanimous opinion in *Riverside Bayview*," *post*, at 792; and "Congress' deliberate acquiescence in the Corps' regulations in 1977," *post*, at 797. Each of these is demonstrably inadequate to support the apparently limitless scope that the dissent would permit the Corps to give to the Act.

### A

The dissent's assertion that *Riverside Bayview* "squarely controls these cases," *post*, at 792, is wholly implausible. First, *Riverside Bayview* could not possibly support the dissent's acceptance of the Corps' inclusion of dry beds as "tributaries," *post*, at 804, because the definition of tributaries was not at issue in that case. *Riverside Bayview* addressed only the Act's inclusion of wetlands abutting navigable-in-fact waters, and said nothing at all about what nonnavigable tributaries the Act might also cover.

*Riverside Bayview* likewise provides no support for the dissent's complacent acceptance of the Corps' definition of "adjacent," which (as noted above) has been extended beyond reason to include, *inter alia*, the 100-year floodplain of covered waters. See *supra*, at 728. The dissent notes that *Riverside Bayview* quoted without comment the Corps' description of "adjacent" wetlands as those " 'that form the border of or are in reasonable proximity to other waters' . . . of the United States." *Post,* at 793 (citing 474 U. S., at 134 (quoting 42 Fed. Reg. 37128)). As we have already discussed, this quotation provides no support for the inclusion of physically unconnected wetlands as covered "waters." See *supra,* at 741, n. 10. The dissent relies principally on a footnote in *Riverside Bayview* recognizing that " 'not every adjacent wetland is of great importance to the environment of adjoining bodies of water,' " and that all " 'adjacent' " wetlands are nevertheless covered by the Act, *post,* at 793 (quoting 474 U. S., at 135, n. 9). Of course, this footnote says *nothing* to support the dissent's broad definition of "adjacent"—quite the contrary, the quoted sentence uses "adjacent" and "adjoining" *interchangeably,* and the footnote qualifies a sentence holding that the wetland was covered *"[b]ecause"* it "actually abut[ted] on a navigable waterway." *Id.,* at 135 (emphasis added). Moreover, that footnote's assertion that the Act may be interpreted to include even those adjoining wetlands that are "lacking in importance to the aquatic environment," *id.,* at 135, n. 9, confirms that the scope of ambiguity of "the waters of the United States" is determined by a wetland's *physical connection* to covered waters, *not* its ecological relationship thereto.

The dissent reasons (1) that *Riverside Bayview* held that "the waters of the United States" include "adjacent wetlands," and (2) we must defer to the Corps' interpretation of the ambiguous word "adjacent." *Post,* at 805–806. But this is mere legerdemain. The phrase "adjacent wetlands" is not part of the statutory definition that the Corps is authorized to interpret, which refers only to "the waters of the United States," 33 U. S. C. § 1362(7).[12] In expounding the term "adjacent" as used in *Riverside Bayview,* we are explaining *our own* prior use of that word to interpret the definitional phrase "the waters of the United States." However ambiguous the term may be in the abstract, as we have explained earlier, "adjacent" as used in *Riverside Bayview* is not ambiguous between "physically abutting" and merely "nearby." See *supra,* at 740–742.

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[12] Nor does the passing reference to "wetlands adjacent thereto" in § 1344(g)(1) purport to expand that statutory definition. As the dissent concedes, *post,* at 805, that reference merely confirms that the statutory definition can be read to include *some* wetlands—namely, those that directly "abut" covered waters. *Riverside Bayview* explicitly acknowledged that § 1344(g)(1) "does not conclusively determine the construction

The dissent would distinguish *SWANCC* on the ground that it "had nothing to say about wetlands," *post,* at 794—*i. e.,* it concerned "isolated *ponds*" rather than isolated *wetlands.* This is the ultimate distinction without a difference. If isolated "permanent and seasonal ponds of varying size . . . and depth," 531 U. S., at 163—which, after all, might at least be described as "waters" in their own right—did not constitute "waters of the United States," *a fortiori,* isolated swampy *lands* do not constitute "waters of the United States." See also 474 U. S., at 132. As the author of today's dissent has written, "[i]f, as I believe, actually navigable waters lie at the very heart of Congress' commerce power and 'isolated,' nonnavigable waters lie closer to . . . the margin, 'isolated wetlands,' which are themselves only marginally 'waters,' are the most marginal category of 'waters of the United States' potentially covered by the statute." 531 U. S., at 187, n. 13 (STEVENS, J., dissenting).

The only other ground that the dissent offers to distinguish *SWANCC* is that, unlike the ponds in *SWANCC,* the wetlands in these cases are "adjacent to navigable bodies of water and their tributaries"—where "adjacent" may be interpreted who-knows-how broadly. It is not clear why roughly defined physical proximity should make such a difference—without actual abutment, it raises no boundary-

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to be placed on the use of the term 'waters' elsewhere in the Act *(particularly in [§ 1362(7)], which contains the relevant definition of 'navigable waters');* however, . . . it does at least suggest strongly that the term 'waters' as used in the Act *does not necessarily exclude* 'wetlands.'" 474 U. S., at 138, n. 11 (emphasis added).

drawing ambiguity, and it is undoubtedly a poor proxy for ecological significance. In fact, though the dissent is careful to restrict its discussion to wetlands "adjacent" to tributaries, its *reasons* for including those wetlands are strictly ecological—such wetlands would be included because they "serve . . . important water quality roles," *post*, at 796, and "play important roles in the watershed," *post*, at 803. This reasoning would swiftly overwhelm *SWANCC* altogether; after all, the ponds at issue in *SWANCC* could, no less than the wetlands in these cases, "offer 'nesting, spawning, rearing and resting sites for aquatic or land species,'" and "'serve as valuable storage areas for storm and flood waters,'" *post*, at 796. The dissent's exclusive focus on ecological factors, combined with its total deference to the Corps' ecological judgments, would permit the Corps to regulate the entire country as "waters of the United States."

## B

Absent a plausible ground in our case law for its sweeping position, the dissent relies heavily on "Congress' deliberate acquiescence in the Corps' regulations in 1977," *post*, at 797—noting that "[w]e found [this acquiescence] significant in *Riverside Bayview*," and even "acknowledged in *SWANCC*" that we had done so, *ibid.* *SWANCC* "acknowledged" that *Riverside Bayview* had relied on congressional acquiescence only to criticize that reliance. It reasserted in no uncertain terms our oft-expressed skepticism toward reading the tea leaves of congressional inaction:

> "Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care. Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute. . . . The relationship between the actions and inactions of the 95th Congress and the intent of the 92d Congress in passing [§ 1344(a)] is also considerably at-

> tenuated. Because subsequent history is less illuminating than the contemporaneous evidence, respondents face a difficult task in overcoming the plain text and import of [§ 1344(a)]." 531 U. S., at 169–170 (brackets, citations, internal quotation marks, and footnote omitted).

Congress takes no governmental action except by legislation. What the dissent refers to as "Congress' deliberate acquiescence" should more appropriately be called Congress's failure to express any opinion. We have no idea whether the Members' failure to act in 1977 was attributable to their belief that the Corps' regulations were correct, or rather to their belief that the courts would eliminate any excesses, or indeed simply to their unwillingness to confront the environmental lobby. To be sure, we have sometimes relied on congressional acquiescence when there is evidence that Congress considered and rejected the "*precise* issue" presented before the Court, *Bob Jones Univ.* v. *United States,* 461 U. S. 574, 600 (1983) (emphasis added). However, "[a]bsent such *overwhelming evidence* of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation." *SWANCC, supra,* at 169–170, n. 5 (emphasis added).

The dissent falls far short of producing "overwhelming evidence" that Congress considered and failed to act upon the "precise issue" before the Court today—namely, what constitutes an "adjacent" wetland covered by the Act. Citing *Riverside Bayview*'s account of the 1977 debates, the dissent claims nothing more than that Congress "conducted extensive debates about the Corps' regulatory jurisdiction over wetlands [and] rejected efforts to limit that jurisdiction . . . ." *Post,* at 797. In fact, even that vague description goes too far. As recounted in *Riverside Bayview,* the 1977 debates concerned a proposal to "limi[t] the Corps' authority under [§ 1344] to waters navigable in fact and their adjacent wetlands (defined as wetlands periodically inundated by contiguous navigable waters)," 474 U. S., at 136. In rejecting this proposal, Congress merely failed to enact a limitation of "waters" to include only navigable-in-fact waters—an interpretation we affirmatively reject today, see *supra*, at 731—and a definition of wetlands based on "periodi[c] inundat[ion]" that appears almost nowhere in the briefs or opinions of these cases.[13] No plausible interpretation of this legislative inaction can construe it as an implied endorsement of every jot and tittle of the Corps' 1977 regulations. In fact, *Riverside Bayview* itself relied on this legislative inaction only as "at least some evidence of the reasonableness" of the agency's inclusion of adjacent wetlands under the Act, 474 U. S., at 137, and for the observation that "even those who would have restricted the reach of the Corps' jurisdiction" would not have excised adjacent wetlands, *ibid.* Both of these conclusions are perfectly consistent with our interpretation, and neither illuminates the disputed question of what constitutes an "adjacent" wetland.

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[13] The sole exception is in JUSTICE KENNEDY's opinion, which argues that *Riverside Bayview* rejected our physical-connection requirement by accepting as a given that *any* wetland formed by inundation from covered waters (whether or not continuously connected to them) is covered by the Act: "The Court in *Riverside Bayview* . . . did not suggest that a flood-based origin would not support jurisdiction; indeed, it presumed the opposite. See 474 U. S., at 134 (noting that the Corps' view was valid '*even* for wetlands that are not the result of flooding or permeation' (emphasis added))." *Post*, at 773. Of course JUSTICE KENNEDY himself fails to observe this supposed presumption, since his "significant nexus" test makes no exception for wetlands created by inundation. In any event, the language from *Riverside Bayview* in JUSTICE KENNEDY's parenthetical is wrenched out of context. The sentence which JUSTICE KENNEDY quotes in part immediately followed the Court's conclusion that "adjacent" wetlands are included because of "the inherent difficulties of defining precise bounds to regulable waters," 474 U. S., at 134. And the full sentence reads as follows: "This holds true even for wetlands that are not the result of flooding or permeation by water having its source in *adjacent* bodies of open water," *ibid.* (emphasis added). Clearly, the "wetlands" referred to in the sentence are only "adjacent" wetlands—namely, those with the continuous physical connection that the rest of the *Riverside Bayview* opinion required, see *supra*, at 740–742. Thus, it is evident that the quoted language was not at all a rejection of the physical-connection requirement, but rather a rejection of the alternative position (which had been adopted by the lower court in that case, see 474 U. S., at 125) that the *only* covered wetlands are those created by inundation. As long as the wetland is "adjacent" to covered waters, said *Riverside Bayview*, its creation *vel non* by inundation is irrelevant.

### C

In a curious appeal to entrenched executive error, the dissent contends that "the appropriateness of the Corps' 30-year implementation of the Clean Water Act should be addressed to Congress or the Corps rather than to the Judiciary." *Post,* at 799; see also *post,* at 787–788, 807. Surely this is a novel principle of administrative law—a sort of 30-year adverse possession that insulates disregard of statutory text from judicial review. It deservedly has no precedent in our jurisprudence. We did not invoke such a principle in *SWANCC,* when we invalidated one aspect of the Corps' implementation.

The dissent contends that "[b]ecause there is ambiguity in the phrase 'waters of the United States' and because interpreting it broadly to cover such ditches and streams advances the purpose of the Act, the Corps' approach should command our deference." *Post,* at 804. Two defects in a single sentence: "[W]aters of the United States" is in *some* respects ambiguous. The *scope* of that ambiguity, however, does not conceivably extend to whether storm drains and dry ditches are "waters," and hence does not support the Corps' interpretation. And as for advancing "the purpose of the Act": We have often criticized that last resort of extravagant interpretation, noting that no law pursues its purpose at all costs, and that the textual limitations upon a law's scope are no less a part of its "purpose" than its substantive authorizations. See, *e. g., Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.,* 514 U. S. 122, 135–136 (1995).

Finally, we could not agree more with the dissent's statement, *post,* at 799, that "[w]hether the benefits of particular conservation measures outweigh their costs is a classic question of public policy that should not be answered by appointed judges." Neither, however, should it be answered by appointed officers of the Corps of Engineers in contradiction of congressional direction. It is the dissent's opinion, and not ours, which appeals not to a reasonable interpretation of enacted text, but to the great environmental benefits that a patently unreasonable interpretation can achieve. We have begun our discussion by mentioning, to be sure, the high costs imposed by that interpretation—but they are in no way the basis for our decision, which rests, plainly and simply, upon the limited meaning that can be borne by the phrase "waters of the United States."

## VII

JUSTICE KENNEDY's opinion concludes that our reading of the Act "is inconsistent with its text, structure, and purpose." *Post*, at 776. His own opinion, however, leaves the Act's "text" and "structure" virtually unaddressed, and rests its case upon an interpretation of the phrase "significant nexus," *ibid.*, which appears in one of our opinions.

To begin with, JUSTICE KENNEDY's reading of "significant nexus" bears no easily recognizable relation to either the case that used it *(SWANCC)* or to the earlier case that that case purported to be interpreting *(Riverside Bayview)*. To establish a "significant nexus," JUSTICE KENNEDY would require the Corps to "establish . . . on a case-by-case basis" that wetlands adjacent to nonnavigable tributaries "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Post*, at 782, 780. This standard certainly does not come from *Riverside Bayview*, which explicitly rejected such case-by-case determinations of ecological significance for the *jurisdictional* question whether a wetland is covered, holding instead that *all* physically connected wetlands are covered. 474 U. S., at 135, n. 9. It is true enough that one reason for accepting that physical-connection criterion was the likelihood that a physically connected wetland would have an ecological effect upon the adjacent waters. But case-by-case determination of ecological effect *was not the test.* Likewise, that test cannot be derived from *SWANCC*'s characterization of *Riverside Bayview,* which emphasized that the wetlands which possessed a "significant nexus" in that earlier case "actually abutted on a navigable waterway," 531 U. S., at 167, and which *specifically rejected* the argument that physically unconnected ponds could be included based on their ecological connection to covered waters. In fact, JUSTICE KENNEDY acknowledges that neither *Riverside Bayview* nor *SWANCC* required, for wetlands abutting navigable-in-fact waters, the case-by-case ecological determination that he proposes for wetlands that neighbor nonnavigable tributaries. See *post,* at 780. Thus, JUSTICE KENNEDY misreads *SWANCC*'s "significant nexus" statement as mischaracterizing *Riverside Bayview* to adopt a case-by-case test of ecological significance; and then transfers that standard to a context that *Riverside Bayview* expressly declined to address (namely, wetlands nearby nonnavigable tributaries); while all the time *conceding* that this standard does not apply in the context that *Riverside Bayview did* address (wetlands abutting navigable waterways). Truly, this is "turtles all the way down."[14]

But misreading our prior decisions is not the principal problem. The principal problem is reading them in utter isolation from the text of the Act. One would think, after reading JUSTICE KENNEDY's exegesis, that the crucial provision of the text of the CWA was a jurisdictional requirement of "significant nexus" between wetlands and navigable waters. In fact, however, that phrase appears nowhere in the Act, but is taken from *SWANCC*'s cryptic characterization of the holding of *Riverside Bayview*. *Our* interpretation of the phrase is both consistent with those opinions *and* compatible with what the Act *does* establish as the jurisdictional criterion: "waters of the United States." Wetlands are "waters of the United States" if they bear the "significant nexus" of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States. What other nexus could *conceivably* cause them to *be* "waters of the United States"? JUSTICE KENNEDY's test is that they, "either alone or in combination with similarly situated lands in the region, significantly *affect* the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable,'" *post*, at 780 (emphasis added). But what possible linguistic usage would accept that whatever (alone or in combination) *affects* waters of the United States *is* waters of the United States?

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[14] The allusion is to a classic story told in different forms and attributed to various authors. See, *e. g.,* Geertz, Thick Description: Toward an Interpretive Theory of Culture, in The Interpretation of Cultures 28–29 (1973). In our favored version, an Eastern guru affirms that the earth is supported on the back of a tiger. When asked what supports the tiger, he says it stands upon an elephant; and when asked what supports the elephant he says it is a giant turtle. When asked, finally, what supports the giant turtle, he is briefly taken aback, but quickly replies "Ah, after that it is turtles all the way down."

Only by ignoring the text of the statute and by assuming that the phrase of *SWANCC* ("significant nexus") can properly be interpreted in isolation from that text does JUSTICE KENNEDY reach the conclusion he has arrived at. Instead of limiting its meaning by reference to the text it was applying, he purports to do so by reference to what he calls the "purpose" of the statute. Its purpose is to clean up the waters of the United States, and therefore anything that might "significantly affect" the purity of those waters bears a "significant nexus" to those waters, and thus (he never says this, but the text of the statute demands that he mean it) *is* those waters. This is the familiar tactic of substituting the purpose of the statute for its text, freeing the Court to write a different statute that achieves the same purpose. To begin with, as we have discussed earlier, clean water is not the *only* purpose of the statute. So is the preservation of primary state responsibility for ordinary land-use decisions. 33 U. S. C. § 1251(b). JUSTICE KENNEDY's test takes no account of this purpose. More fundamentally, however, the test simply rewrites the statute, using for that purpose the gimmick of "significant nexus." It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that "significantly affect the chemical, physical, and biological integrity of" waters of the United States. It did not do that, but instead explicitly limited jurisdiction to "waters of the United States."

JUSTICE KENNEDY's disposition would disallow some of the Corps' excesses, and in that respect is a more moderate flouting of statutory command than JUSTICE STEVENS'.[15] In another respect, however, it is more extreme. At least JUSTICE STEVENS can blame his implausible reading of the statute upon the Corps. His error consists of giving that agency more deference than reason permits. JUSTICE KENNEDY, however, has devised his new statute all on his own. It purports to be, not a grudging acceptance of an agency's close-to-the-edge expansion of its own powers, but rather *the* most reasonable interpretation of the law. It is far from that, unless whatever affects waters is waters.

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[15] It is unclear *how much* more moderate the flouting is, since JUSTICE KENNEDY's "significant nexus" standard is perfectly opaque. When, exactly, does a wetland "significantly affect" covered waters, and when are its effects "in contrast . . . speculative or insubstantial"? *Post,* at 780. JUSTICE KENNEDY does not tell us clearly—except to suggest, *post,* at 782, that " ' "isolated" is generally a matter of degree' " (quoting Leibowitz & Nadeau, Isolated Wetlands: State-of-the-Science and Future Directions, 23 Wetlands 663, 669 (2003)). As the dissent hopefully observes, *post,* at 808, such an unverifiable standard is not likely to constrain an agency whose disregard for the statutory language has been so long manifested. In fact, by stating that "[i]n both the consolidated cases before the Court the record contains evidence suggesting the possible existence of a significant nexus according to the principles outlined above," *post,* at 783, JUSTICE KENNEDY tips a wink at the agency, inviting it to try its same expansive reading again.

## VIII

Because the Sixth Circuit applied the wrong standard to determine if these wetlands are covered "waters of the United States," and because of the paucity of the record in both of these cases, the lower courts should determine, in the first instance, whether the ditches or drains near each wetland are "waters" in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are "adjacent" to these "waters" in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview.*

* * *

We vacate the judgments of the Sixth Circuit in both No. 04–1034 and No. 04–1384, and remand both cases for further proceedings.

*It is so ordered.*

CHIEF JUSTICE ROBERTS, concurring.

Five years ago, this Court rejected the position of the Army Corps of Engineers on the scope of its authority to regulate wetlands under the Clean Water Act, 86 Stat. 816, as amended, 33 U. S. C. § 1251 *et seq. Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers,* 531 U. S. 159 (2001) *(SWANCC).* The Corps had taken the view that its authority was essentially limitless; this Court explained that such a boundless view was inconsistent with the limiting terms Congress had used in the Act. *Id.,* at 167–174.

In response to the *SWANCC* decision, the Corps and the Environmental Protection Agency (EPA) initiated a rulemaking to consider "issues associated with the scope of waters that are subject to the Clean Water Act (CWA), in light of the U. S. Supreme Court decision in *[SWANCC].*" 68

Fed. Reg. 1991 (2003). The "goal of the agencies" was "to develop proposed regulations that will further the public interest by clarifying what waters are subject to CWA jurisdiction and affording full protection to these waters through an appropriate focus of Federal and State resources consistent with the CWA." *Ibid.*

Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984). Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority.

The proposed rulemaking went nowhere. Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.

It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis. This situation is certainly not unprecedented. See *Grutter* v. *Bollinger*, 539 U. S. 306, 325 (2003) (discussing *Marks* v. *United States*, 430 U. S. 188 (1977)). What is unusual in this instance, perhaps, is how readily the situation could have been avoided.*

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*The scope of the proposed rulemaking was not as narrow as JUSTICE STEVENS suggests, *post*, at 795–796, n. 4 (dissenting opinion). See 68 Fed. Reg. 1994 (2003) ("Additionally, we invite your views as to whether any other revisions are needed to the existing regulations on which waters are jurisdictional under the CWA"); *id.*, at 1992 ("Today's [notice of proposed

JUSTICE KENNEDY, concurring in the judgment.

These consolidated cases require the Court to decide whether the term "navigable waters" in the Clean Water Act extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact. In *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers,* 531 U. S. 159 (2001) *(SWANCC),* the Court held, under the circumstances presented there, that to constitute "'navigable waters'" under the Act, a water or wetland must possess a "significant nexus" to waters that are or were navigable in fact or that could reasonably be so made. *Id.,* at 167, 172. In the instant cases neither the plurality opinion nor the dissent by JUSTICE STEVENS chooses to apply this test; and though the Court of Appeals recognized the test's applicability, it did not consider all the factors necessary to determine whether the lands in question had, or did not have, the requisite nexus. In my view the cases ought to be remanded to the Court of Appeals for proper consideration of the nexus requirement.

## I

Although both the plurality opinion and the dissent by JUSTICE STEVENS (hereinafter the dissent) discuss the background of these cases in some detail, a further discussion of the relevant statutes, regulations, and facts may clarify the analysis suggested here.

### A

The "objective" of the Clean Water Act (or Act) is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U. S. C. § 1251(a). To

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rulemaking] seeks public input on what, if any, revisions in light of SWANCC might be appropriate to the regulations that define 'waters of the U. S.', and today's [notice] thus would be of interest to *all entities* discharging to, or regulating, *such waters*" (emphasis added)). The agencies can decide for themselves whether, as the *SWANCC* dissenter suggests, it was wise for them to take no action in response to *SWANCC.*

that end, the statute, among other things, prohibits "the discharge of any pollutant by any person" except as provided in the Act. § 1311(a). As relevant here, the term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." § 1362(12). The term "pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." § 1362(6). The Secretary of the Army, acting through the Chief of Engineers of the Army Corps of Engineers, may issue permits for "discharge of dredged or fill material into the navigable waters at specified disposal sites." §§ 1344(a), (c), (d); but see § 1344(f) (categorically exempting certain forms of "discharge of dredged or fill material" from regulation under § 1311(a)). Pursuant to § 1344(g), States with qualifying programs may assume certain aspects of the Corps' permitting responsibility. Apart from dredged or fill material, pollutant discharges require a permit from the Environmental Protection Agency (EPA), which also oversees the Corps' (and qualifying States') permitting decisions. See §§ 1311(a), 1342(a), 1344(c). Discharge of pollutants without an appropriate permit may result in civil or criminal liability. See § 1319.

The statutory term to be interpreted and applied in the two instant cases is the term "navigable waters." The outcome turns on whether that phrase reasonably describes certain Michigan wetlands the Corps seeks to regulate. Under the Act "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." § 1362(7). In a regulation the Corps has construed the term "waters of the United States" to include not only waters susceptible to use in interstate commerce—the traditional understanding of the term "navigable waters of the United States," see, *e. g., United States* v. *Appalachian Elec. Power Co.,* 311 U. S.

377, 406–408 (1940); *The Daniel Ball,* 10 Wall. 557, 563–564 (1871)—but also tributaries of those waters and, of particular relevance here, wetlands adjacent to those waters or their tributaries. 33 CFR §§ 328.3(a)(1), (5), (7) (2005). The Corps views tributaries as within its jurisdiction if they carry a perceptible "ordinary high water mark." § 328.4(c); 65 Fed. Reg. 12823 (2000). An ordinary high-water mark is a "line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 CFR § 328.3(e).

Contrary to the plurality's description, *ante,* at 722, 734, wetlands are not simply moist patches of earth. They are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." § 328.3(b). The Corps' Wetlands Delineation Manual, including over 100 pages of technical guidance for Corps officers, interprets this definition of wetlands to require: (1) prevalence of plant species typically adapted to saturated soil conditions, determined in accordance with the United States Fish and Wildlife Service's National List of Plant Species that Occur in Wetlands; (2) hydric soil, meaning soil that is saturated, flooded, or ponded for sufficient time during the growing season to become anaerobic, or lacking in oxygen, in the upper part; and (3) wetland hydrology, a term generally requiring continuous inundation or saturation to the surface during at least five percent of the growing season in most years. See Wetlands Research Program Technical Report Y–87–1 (online edition), pp. 12–34 (Jan. 1987), http://www.saj.usace.

army.mil/permit/documents/87manual.pdf (all Internet materials as visited June 16, 2006, and available in Clerk of Court's case file). Under the Corps' regulations, wetlands are adjacent to tributaries, and thus covered by the Act, even if they are "separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." § 328.3(c).

### B

The first consolidated case before the Court, *Rapanos* v. *United States*, No. 04–1034, relates to a civil enforcement action initiated by the United States in the United States District Court for the Eastern District of Michigan against the owners of three land parcels near Midland, Michigan. The first parcel, known as the Salzburg site, consists of roughly 230 acres. The District Court, applying the Corps' definition of wetlands, found based on expert testimony that the Salzburg site included 28 acres of wetlands. The District Court further found that "the Salzburg wetlands have a surface water connection to tributaries of the Kawkawlin River which, in turn, flows into the Saginaw River and ultimately into Lake Huron." App. to Pet. for Cert. B11. Water from the site evidently spills into the Hoppler Drain, located just north of the property, which carries water into the Hoppler Creek and thence into the Kawkawlin River, which is navigable. A state official testified that he observed carp spawning in a ditch just north of the property, indicating a direct surface-water connection from the ditch to the Saginaw Bay of Lake Huron.

The second parcel, known as the Hines Road site, consists of 275 acres, which the District Court found included 64 acres of wetlands. The court found that the wetlands have a surface-water connection to the Rose Drain, which carries water into the Tittabawassee River, a navigable waterway. The final parcel, called the Pine River site, consists of some 200 acres. The District Court found that 49 acres were wetlands and that a surface-water connection linked the wetlands to the nearby Pine River, which flows into Lake Huron.

At all relevant times, John Rapanos owned the Salzburg site; a company he controlled owned the Hines Road site; and Rapanos' wife and a company she controlled (possibly in connection with another entity) owned the Pine River site. All these parties are petitioners here. In December 1988, Mr. Rapanos, hoping to construct a shopping center, asked the Michigan Department of Natural Resources to inspect the Salzburg site. A state official informed Rapanos that while the site likely included regulated wetlands, Rapanos could proceed with the project if the wetlands were delineated (that is, identified and preserved) or if a permit were obtained. Pursuing the delineation option, Rapanos hired a wetlands consultant to survey the property. The results evidently displeased Rapanos: Informed that the site included between 48 and 58 acres of wetlands, Rapanos allegedly threatened to "destroy" the consultant unless he eradicated all traces of his report. Rapanos then ordered $350,000-worth of earthmoving and landclearing work that filled in 22 of the 64 wetlands acres on the Salzburg site. He did so without a permit and despite receiving cease-and-desist orders from state officials and the EPA. At the Hines Road and Pine River sites, construction work—again conducted in violation of state and federal compliance orders—altered an additional 17 and 15 wetlands acres, respectively.

The Federal Government brought criminal charges against Rapanos. In the suit at issue here, however, the United States alleged civil violations of the Clean Water Act against all the *Rapanos* petitioners. Specifically, the Government claimed that petitioners discharged fill into jurisdictional wetlands, failed to respond to requests for information, and ignored administrative compliance orders. See 33 U. S. C. §§ 1311(a), 1318(a), 1319(a). After a 13-day bench trial, the District Court made the findings noted earlier and, on that basis, upheld the Corps' jurisdiction over wetlands on the three parcels. On the merits the court ruled in the Government's favor, finding that violations occurred at all three sites. As to two other sites, however, the court rejected the Corps' claim to jurisdiction, holding that the Government had failed to carry its burden of proving the existence of wetlands under the three-part regulatory definition. (These two parcels are no longer at issue.) The United States Court of Appeals for the Sixth Circuit affirmed. 376 F. 3d 629, 634 (2004). This Court granted certiorari to consider the Corps' jurisdiction over wetlands on the Salzburg, Hines Road, and Pine River sites. 546 U. S. 932 (2005).

The second consolidated case, *Carabell*, No. 04–1384, involves a parcel shaped like a right triangle and consisting of some 19.6 acres, 15.9 of which are forested wetlands. 257 F. Supp. 2d 917, 923 (ED Mich. 2003). The property is located roughly one mile from Lake St. Clair, a 430-square-mile lake located between Michigan and Canada that is popular for boating and fishing and produces some 48 percent of the sport fish caught in the Great Lakes, see Brief for Macomb County, Michigan, as *Amicus Curiae* 2. The right-angle corner of the property is located to the northwest. The hypotenuse, which runs from northeast to southwest, lies alongside a man-made berm that separates the property from a ditch. At least under current conditions—that is, without the deposit of fill in the wetlands that the landowners propose—the berm ordinarily, if not always, blocks surface-water flow from the wetlands into the ditch. But cf. App. 186a (administrative hearing testimony by consultant for Carabells indicating "you would start seeing some overflow" in a "ten year storm"). Near the northeast corner of the property, the ditch connects with the Sutherland-Oemig Drain, which carries water continuously throughout the year and empties into Auvase Creek. The creek in turn empties into Lake St. Clair. At its southwest end, the ditch connects to other ditches that empty into the Auvase Creek and thence into Lake St. Clair.

In 1993 petitioners Keith and June Carabell sought a permit from the Michigan Department of Environmental Quality (MDEQ), which has assumed permitting functions of the Corps pursuant to § 1344(g). Petitioners hoped to fill in the wetlands and construct 130 condominium units. Although the MDEQ denied the permit, a State Administrative Law Judge directed the agency to approve an alternative plan, proposed by the Carabells, that involved the construction of 112 units. This proposal called for filling in 12.2 acres of the property while creating retention ponds on 3.74 acres. Because the EPA had objected to the permit, jurisdiction over the case transferred to the Corps. See § 1344(j).

The Corps' district office concluded that the Carabells' property "provides water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oemig Drain, Auvase Creek, and Lake St. Clair." *Id.*, at 127a. The district office denied the permit, and the Corps upheld the denial in an administrative appeal. The Carabells, challenging both the Corps' jurisdiction and the merits of the permit denial, sought judicial review pursuant to the Administrative Procedure Act, 5 U. S. C. § 706(2)(A). The United States District Court for the Eastern District of Michigan granted summary judgment to the Corps, 257 F. Supp. 2d 917 (2003), and the United States Court of Appeals for the Sixth Circuit affirmed, 391 F. 3d 704 (2004). This Court granted certiorari to consider the jurisdictional question. 546 U. S. 932 (2005).

## II

Twice before the Court has construed the term "navigable waters" in the Clean Water Act. In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121 (1985), the Court upheld the Corps' jurisdiction over wetlands adjacent to navigable-in-fact waterways. *Id.*, at 139. The property in *Riverside Bayview*, like the wetlands in the *Carabell* case now before the Court, was located roughly one mile from

Lake St. Clair, see *United States* v. *Riverside Bayview Homes, Inc.*, 729 F. 2d 391, 392 (CA6 1984) (decision on review in *Riverside Bayview*), though in that case, unlike *Carabell*, the lands at issue formed part of a wetland that directly abutted a navigable-in-fact creek, 474 U. S., at 131. In regulatory provisions that remain in effect, the Corps had concluded that wetlands perform important functions such as filtering and purifying water draining into adjacent water bodies, 33 CFR § 320.4(b)(2)(vii) (1985), slowing the flow of runoff into lakes, rivers, and streams so as to prevent flooding and erosion, §§ 320.4(b)(2)(iv), (v), and providing critical habitat for aquatic animal species, § 320.4(b)(2)(i). 474 U. S., at 134–135. Recognizing that "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress," *id.*, at 131 (citing *Chemical Mfrs. Assn.* v. *Natural Resources Defense Council, Inc.*, 470 U. S. 116, 125 (1985), and *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984)), the Court held that "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act," 474 U. S., at 134. The Court reserved, however, the question of the Corps' authority to regulate wetlands other than those adjacent to open waters. See *id.*, at 131–132, n. 8.

In *SWANCC*, the Court considered the validity of the Corps' jurisdiction over ponds and mudflats that were isolated in the sense of being unconnected to other waters covered by the Act. 531 U. S., at 171. The property at issue was an abandoned sand and gravel pit mining operation where "remnant excavation trenches" had "evolv[ed] into a scattering of permanent and seasonal ponds." *Id.*, at 163. Asserting jurisdiction pursuant to a regulation called the "Migratory Bird Rule," the Corps argued that these isolated ponds were "waters of the United States" (and thus "navigable waters" under the Act) because they were used as habitat by migratory birds. *Id.*, at 164–165. The Court rejected this theory. "It was the significant nexus between wetlands and 'navigable waters,'" the Court held, "that informed our reading of the [Act] in *Riverside Bayview Homes.*" *Id.*, at 167. Because such a nexus was lacking with respect to isolated ponds, the Court held that the plain text of the statute did not permit the Corps' action. *Id.*, at 172.

*Riverside Bayview* and *SWANCC* establish the framework for the inquiry in the cases now before the Court: Do the Corps' regulations, as applied to the wetlands in *Carabell* and the three wetlands parcels in *Rapanos*, constitute a reasonable interpretation of "navigable waters" as in *Riverside Bayview* or an invalid construction as in *SWANCC?* Taken together these cases establish that in some instances, as exemplified by *Riverside Bayview*, the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking. Because neither the plurality nor the dissent addresses the nexus requirement, this separate opinion, in my respectful view, is necessary.

### A

The plurality's opinion begins from a correct premise. As the plurality points out, and as *Riverside Bayview* holds, in enacting the Clean Water Act Congress intended to regulate at least some waters that are not navigable in the traditional sense. *Ante*, at 731; *Riverside Bayview, supra*, at 133; see also *SWANCC, supra*, at 167. This conclusion is supported by "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems." *Riverside Bayview, supra*, at 133; see also *Milwaukee* v. *Illinois*, 451 U. S. 304, 318 (1981) (describing the Act as "an all-encompassing program of water pollution regulation"). It is further compelled by statutory text, for the text is explicit in extending the coverage of the Act to some nonnavigable waters. In a provision allowing States to assume some regulatory functions of the Corps (an option Michigan has exercised), the Act limits States to issuing permits for:

> "the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their ordinary high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction." 33 U. S. C. § 1344(g)(1).

Were there no Clean Water Act "navigable waters" apart from waters "presently used" or "susceptible to use" in interstate commerce, the "other than" clause, which begins the long parenthetical statement, would overtake the delegation of authority the provision makes at the outset. Congress, it follows, must have intended a broader meaning for navigable waters. The mention of wetlands in the "other than" clause, moreover, makes plain that at least some wetlands fall within the scope of the term "navigable waters." See *Riverside Bayview, supra,* at 138–139, and n. 11.

From this reasonable beginning the plurality proceeds to impose two limitations on the Act; but these limitations, it is here submitted, are without support in the language and purposes of the Act or in our cases interpreting it. First, because the dictionary defines "waters" to mean "water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies,'" *ante,* at 732 (quoting Webster's New International Dictionary 2882 (2d ed. 1954) (hereinafter Webster's Second)), the plurality would conclude that the phrase "navigable waters" permits Corps and EPA jurisdiction only over "relatively permanent, standing or flowing bodies of water," *ante,* at 732—a category that in the plurality's view includes "seasonal" rivers, that is, rivers that carry water continuously except during "dry months," but not intermittent or ephemeral streams, *ante,* at 732–734, and n. 5. Second, the plurality asserts that wetlands fall within the Act only if they bear "a continuous surface connection to bodies that are 'waters of the United States' in their own right"—waters, that is, that satisfy the plurality's requirement of permanent standing water or continuous flow. *Ante,* at 742.

The plurality's first requirement—permanent standing water or continuous flow, at least for a period of "some months," *ante,* at 732–733, and n. 5—makes little practical sense in a statute concerned with downstream water quality. The merest trickle, if continuous, would count as a "water" subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not. Though the plurality seems to presume that such irregular flows are too insignificant to be of concern in a statute focused on "waters," that may not always be true. Areas in the western parts of the Nation provide some examples. The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river. See, *e. g.,* B. Gumprecht, The Los Angeles River: Its Life, Death, and Possible Rebirth 1–2 (1999); Martinez, City of Angels' Signature River Tapped for Rebirth, Chicago Tribune, Apr. 10, 2005, section 1, p. 8. Yet it periodically releases water volumes so powerful and destructive that it has been encased in concrete and steel over a length of some 50 miles. See Gumprecht, *supra,* at 227. Though this particular waterway might satisfy the plurality's test, it is illustrative of what often-dry watercourses can become when rain waters flow. See, *e. g.*, County of Los Angeles Dept. of Public Works, Water Resources Division: 2002–2003 Hydrologic Report, Runoff, Daily Discharge, F377–R BOUQUET CANYON CREEK at Urbandale Avenue 11107860 Bouquet Creek Near Saugus, CA, http://ladpw.org/wrd/report/0203/runoff/discharge.cfm (indicating creek carried no flow for much of the year but carried 122 cubic feet per second on Feb. 12, 2003).

To be sure, Congress could draw a line to exclude irregular waterways, but nothing in the statute suggests it has done so. Quite the opposite, a full reading of the dictionary definition precludes the plurality's emphasis on permanence: The term "waters" may mean "flood or inundation," Webster's Second 2882, events that are impermanent by definition. Thus, although of course the Act's use of the adjective "navigable" indicates a focus on waterways rather than floods, Congress' use of "waters" instead of "water," *ante*, at 732, does not necessarily carry the connotation of "relatively permanent, standing or flowing bodies of water," *ibid.* (And contrary to the plurality's suggestion, *ante*, at 732, n. 4, there is no indication in the dictionary that the " 'flood or inundation' " definition is limited to poetry.) In any event, even granting the plurality's preferred definition—that "waters" means "water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,' " *ante*, at 732 (quoting Webster's Second 2882)—the dissent is correct to observe that an intermittent flow can constitute a stream, in the sense of " '[a] current or course of water or other fluid, flowing on the earth,' " *ante*, at 733, n. 6 (quoting Webster's Second 2493), while it is flowing. See *post*, at 801 (also noting Court's use of the phrase " 'intermittent stream' " in *Harrisonville* v. *W. S. Dickey Clay Mfg. Co.*, 289 U. S. 334, 335 (1933)). It follows that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams.

Apart from the dictionary, the plurality invokes *Riverside Bayview* to support its interpretation that the term "waters" is so confined, but this reliance is misplaced. To be sure, the Court there compared wetlands to "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'" 474 U. S., at 131. It is quite a stretch to claim, however, that this mention of hydrographic features "echoe[s]" the dictionary's reference to "'*geographical features* such as oceans, rivers, [and] lakes.'" *Ante,* at 735 (quoting Webster's Second 2882). In fact the *Riverside Bayview* opinion does not cite the dictionary definition on which the plurality relies, and the phrase "hydrographic features" could just as well refer to intermittent streams carrying substantial flow to navigable waters. See Webster's Second 1221 (defining "hydrography" as "[t]he description and study of seas, lakes, rivers, and other waters; specif[ically] . . . [t]he measurement of flow and investigation of the behavior of streams, esp[ecially] with reference to the control or utilization of their waters").

Also incorrect is the plurality's attempt to draw support from the statutory definition of "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U. S. C. § 1362(14). This definition is central to the Act's regulatory structure, for the term "discharge of a pollutant" is defined in relevant part to mean "any addition of any pollutant to navigable waters from any point source," § 1362(12). Interpreting the point-source definition, the plurality presumes, first, that the point-source examples describe "watercourses through which *intermittent* waters typically flow," and second, that point sources and navigable waters are "separate and distinct categories." *Ante,* at 735–736. From this the plurality concludes, by a sort of negative inference, that navigable waters may not be intermittent. The conclusion is unsound. Nothing in the point-source definition requires an intermittent flow. Polluted water could flow night and day from a pipe, channel, or conduit and yet still qualify as a point source; any contrary conclusion would likely exclude, among other things, effluent streams from sewage treatment plants. As a result, even were the statute read to require continuity of flow for navigable waters, certain water bodies could conceivably constitute both a point source and a water. At any rate, as the dissent observes, the fact that point sources may carry continuous flow undermines the plurality's conclusion that covered "waters" under the Act may not be discontinuous. See *post,* at 802.

The plurality's second limitation—exclusion of wetlands lacking a continuous surface connection to other jurisdictional waters—is also unpersuasive. To begin with, the plurality is wrong to suggest that wetlands are *"indistinguishable"* from waters to which they bear a surface connection. *Ante,* at 755. Even if the precise boundary may be imprecise, a bog or swamp is different from a river. The question is what circumstances permit a bog, swamp, or other nonnavigable wetland to constitute a "navigable water" under the Act—as § 1344(g)(1), if nothing else, indicates is sometimes possible, see *supra,* at 767–768. *Riverside Bayview* addressed that question and its answer is inconsistent with the plurality's theory. There, in upholding the Corps' authority to regulate "wetlands adjacent to other bodies of water over which the Corps has jurisdiction," the Court deemed it irrelevant whether "the moisture creating the wetlands . . . find[s] its source in the adjacent bodies of water." 474 U. S., at 135. The Court further observed that adjacency could serve as a valid basis for regulation even as to "wetlands that are not significantly intertwined with the ecosystem of adjacent waterways." *Id.,* at 135, n. 9. "If it is reasonable," the Court explained, "for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand." *Ibid.*

The Court in *Riverside Bayview* did note, it is true, the difficulty of defining where "water ends and land begins," *id.*, at 132, and the Court cited that problem as one reason for deferring to the Corps' view that adjacent wetlands could constitute waters. Given, however, the further recognition in *Riverside Bayview* that an overinclusive definition is permissible even when it reaches wetlands holding moisture disconnected from adjacent water bodies, *id.*, at 135, and n. 9, *Riverside Bayview*'s observations about the difficulty of defining the water's edge cannot be taken to establish that when a clear boundary is evident, wetlands beyond the boundary fall outside the Corps' jurisdiction.

For the same reason *Riverside Bayview* also cannot be read as rejecting only the proposition, accepted by the Court of Appeals in that case, that wetlands covered by the Act must contain moisture originating in neighboring waterways. See *id.*, at 125, 134. Since the Court of Appeals had accepted that theory, the Court naturally addressed it. Yet to view the decision's reasoning as limited to that issue—an interpretation the plurality urges here, *ante*, at 751, n. 13—would again overlook the opinion's broader focus on wetlands' "significant effects on water quality and the aquatic ecosystem," 474 U. S., at 135, n. 9. In any event, even were this reading of *Riverside Bayview* correct, it would offer no support for the plurality's proposed requirement of a "continuous surface connection," *ante*, at 742. The Court in *Riverside Bayview* rejected the proposition that origination in flooding was necessary for jurisdiction over wetlands. It did not suggest that a flood-based origin would not support jurisdiction; indeed, it presumed the opposite. See 474 U. S., at 134 (noting that the Corps' view was valid "*even* for wetlands that are not the result of flooding or permeation" (emphasis added)). Needless to say, a continuous connection is not necessary for moisture in wetlands to result from flooding—the connection might well exist only during floods.

*SWANCC*, likewise, does not support the plurality's surface-connection requirement. *SWANCC*'s holding that "nonnavigable, isolated, intrastate waters," 531 U. S., at 171, are not "navigable waters" is not an explicit or implicit overruling of *Riverside Bayview*'s approval of adjacency as a factor in determining the Corps' jurisdiction. In rejecting the Corps' claimed authority over the isolated ponds in *SWANCC*, the Court distinguished adjacent nonnavigable waters such as the wetlands addressed in *Riverside Bayview*. 531 U. S., at 167, 170–171.

As *Riverside Bayview* recognizes, the Corps' adjacency standard is reasonable in some of its applications. Indeed, the Corps' view draws support from the structure of the Act, while the plurality's surface-water-connection requirement does not.

As discussed above, the Act's prohibition on the discharge of pollutants into navigable waters, 33 U. S. C. § 1311(a), covers both the discharge of toxic materials such as sewage, chemical waste, biological material, and radioactive material and the discharge of dredged spoil, rock, sand, cellar dirt, and the like. All these substances are defined as pollutants whose discharge into navigable waters violates the Act. §§ 1311(a), 1362(6), (12). One reason for the parallel treatment may be that the discharge of fill material can impair downstream water quality. The plurality argues otherwise, asserting that dredged or fill material "does not normally wash downstream." *Ante*, at 744. As the dissent points out, this proposition seems questionable as an empirical matter. See *post*, at 806–807. It seems plausible that new or loose fill, not anchored by grass or roots from other vegetation, could travel downstream through waterways adjacent to a wetland; at the least this is a factual possibility that the Corps' experts can better assess than can the plurality. Silt, whether from natural or human sources, is a major factor in aquatic environments, and it may clog waterways, alter ecosystems, and limit the useful life of dams. See, *e. g.*, Fountain, Unloved, But Not Unbuilt, N. Y. Times, June 5, 2005, section 4, p. 3, col. 1; DePalma, Rebuilding a River Upstate, For the Love of a Tiny Mussel, N. Y. Times, Apr. 26, 2004, section B, p. 1, col. 2; MacDougall, Damage Can Be Irreversible, Los Angeles Times, June 19, 1987, pt. 1, p. 10, col. 4.

Even granting, however, the plurality's assumption that fill material will stay put, Congress' parallel treatment of fill material and toxic pollution may serve another purpose. As the Court noted in *Riverside Bayview*, "the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, 33 CFR §320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion, see §§320.4(b)(2)(iv) and (v)." 474 U. S., at 134. Where wetlands perform these filtering and runoff-control functions, filling them may increase downstream pollution, much as a discharge of toxic pollutants would. Not only will dirty water no longer be stored and filtered but also the act of filling and draining itself may cause the release of nutrients, toxins, and pathogens that were trapped, neutralized, and perhaps amenable to filtering or detoxification in the wetlands. See U. S. Congress, Office of Technology Assessment, Wetlands: Their Use and Regulation, OTA–O–206, pp. 43, 48–52 (Mar. 1984), http://govinfo.library.unt.edu/ota/OTA_4/DATA/1984/8433.pdf (hereinafter OTA). In many cases, moreover, filling in wetlands separated from another water by a berm can mean that floodwater, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways. With these concerns in mind, the Corps' definition of adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.

In sum the plurality's opinion is inconsistent with the Act's text, structure, and purpose. As a fallback the plurality suggests that avoidance canons would compel its reading even if the text were unclear. *Ante,* at 737–738. In *SWANCC,* as one reason for rejecting the Corps' assertion of jurisdiction over the isolated ponds at issue there, the Court observed that this "application of [the Corps'] regulations" would raise significant questions of Commerce Clause authority and encroach on traditional state land-use regulation. 531 U. S., at 174. As *SWANCC* observed, *ibid.*, and as the plurality points out here, *ante,* at 737, the Act states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources," 33 U. S. C. § 1251(b). The Court in *SWANCC* cited this provision as evidence that a clear statement supporting jurisdiction in applications raising constitutional and federalism difficulties was lacking. 531 U. S., at 174.

The concerns addressed in *SWANCC* do not support the plurality's interpretation of the Act. In *SWANCC,* by interpreting the Act to require a significant nexus with navigable waters, the Court avoided applications—those involving waters without a significant nexus—that appeared likely, as a category, to raise constitutional difficulties and federalism concerns. Here, in contrast, the plurality's interpretation does not fit the avoidance concerns it raises. On the one hand, when a surface-water connection is lacking, the plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters—even though such navigable waters were traditionally subject to federal authority. On the other hand, by saying the Act covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small), the plurality's reading would permit applications of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach. Even assuming, then, that federal regulation of remote wetlands and nonnavigable waterways would raise a difficult Comerce Clause issue notwithstanding those waters' aggregate effects on national water quality, but cf. *Wickard* v. *Filburn,* 317 U. S. 111 (1942); see also *infra,* at 782–783, the plurality's reading is not responsive to this concern. As for States' "responsibilities and rights," § 1251(b), it is noteworthy that 33 States plus the District of Columbia have filed an *amici* brief in this litigation asserting that the Clean Water Act is important to their own water policies. See Brief for State of New York et al. 1–3. These *amici* note, among other things, that the Act protects downstream States from out-of-state pollution that they cannot themselves regulate. *Ibid.*

It bears mention also that the plurality's overall tone and approach—from the characterization of acres of wetlands destruction as "backfilling . . . wet fields," *ante,* at 721, to the rejection of Corps authority over "man-made drainage ditches" and "dry arroyos" without regard to how much water they periodically carry, *ante,* at 734, to the suggestion, seemingly contrary to Congress' judgment, that discharge of fill material is inconsequential for adjacent waterways, *ante,* at 744, and n. 11—seems unduly dismissive of the interests asserted by the United States in these cases. Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular. To give just one example, *amici* here have noted that nutrient-rich runoff from the Mississippi River has created a hypoxic, or oxygen-depleted, "dead zone" in the Gulf of Mexico that at times approaches the size of Massachusetts and New Jersey. Brief for Association of State Wetland Managers et al. 21–23; Brief for Environmental Law Institute 23. Scientific evidence indicates that wetlands play a critical role in controlling and filtering runoff. See, *e. g.,* OTA 43, 48–52; R. Tiner, In Search of Swampland: A Wetland Sourcebook and Field Guide 93–95 (2d ed. 2005); Whitmire & Hamilton, Rapid Removal of Nitrate and Sulfate in Freshwater Wetland Sediments, 34 J. Env. Quality 2062 (2005). It is true, as the plurality indicates, that environmental concerns provide no reason to disregard limits in the statutory text, *ante,* at 745–746, but in my view the plurality's opinion is not a correct reading of the text. The limits the plurality would impose, moreover, give insufficient deference to Congress' purposes in enacting the Clean Water Act and to the authority of the Executive to implement that statutory mandate.

Finally, it should go without saying that because the plurality presents its interpretation of the Act as the only permissible reading of the plain text, *ante,* at 739, 742, the Corps would lack discretion, under the plurality's theory, to adopt contrary regulations. THE CHIEF JUSTICE suggests that if the Corps and EPA had issued new regulations after *SWANCC* they would have "enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority" and thus could have avoided litigation of the issues we address today. *Ante,* at 758 (concurring opinion). That would not necessarily be true under the opinion THE CHIEF JUSTICE has joined. New rulemaking could have averted the disagreement here only if the Corps had anticipated the unprecedented reading of the Act that the plurality advances.

### B

While the plurality reads nonexistent requirements into the Act, the dissent reads a central requirement out—namely, the requirement that the word "navigable" in "navigable waters" be given some importance. Although the Court has held that the statute's language invokes Congress' traditional authority over waters navigable in fact or susceptible of being made so, *SWANCC,* 531 U. S., at 172 (citing *Appalachian Power,* 311 U. S., at 407–408), the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far.

Congress' choice of words creates difficulties, for the Act contemplates regulation of certain "navigable waters" that are not in fact navigable. *Supra,* at 768. Nevertheless, the word "navigable" in the Act must be given some effect. See *SWANCC, supra,* at 172. Thus, in *SWANCC* the Court rejected the Corps' assertion of jurisdiction over isolated ponds and mudflats bearing no evident connection to navigable-in-fact waters. And in *Riverside Bayview,* while the Court indicated that "the term 'navigable' as used in the Act is of limited import," 474 U. S., at 133, it relied, in upholding jurisdiction, on the Corps' judgment that "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water," *id.,* at 135. The implication, of course, was that wetlands' status as "integral parts of the aquatic environment"—that is, their significant nexus with navigable waters—was what established the Corps' jurisdiction over them as waters of the United States.

Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term "navigable" some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U. S. C. § 1251(a), and it pursued that objective by restricting dumping and filling in "navigable waters," §§ 1311(a), 1362(12). With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage. 33

CFR § 320.4(b)(2). Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."

Although the dissent acknowledges that wetlands' ecological functions vis-à-vis other covered waters are the basis for the Corps' regulation of them, *post*, at 796, it concludes that the ambiguity in the phrase "navigable waters" allows the Corps to construe the statute as reaching all "non-isolated wetlands," just as it construed the Act to reach the wetlands adjacent to navigable-in-fact waters in *Riverside Bayview*, see *post*, at 796. This, though, seems incorrect. The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries, however remote and insubstantial—raises concerns that go beyond the holding of *Riverside Bayview;* and so the Corps' assertion of jurisdiction cannot rest on that case.

As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone. That is the holding of *Riverside Bayview.* Furthermore, although the *Riverside Bayview* Court reserved the question of the Corps' authority over "wetlands that are not adjacent to bodies of open water," 474 U. S., at 131–132, n. 8, and in any event addressed no factual situation other than wetlands adjacent to navigable-in-fact waters, it may well be the case that *Riverside Bayview*'s reasoning—supporting jurisdiction without any inquiry beyond adjacency—could apply equally to wetlands adjacent to certain major tributaries. Through regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.

The Corps' existing standard for tributaries, however, provides no such assurance. As noted earlier, the Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark, defined as a "line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics," § 328.3(e). See *supra*, at 761. This standard presumably provides a rough measure of the volume and regularity of flow. Assuming it is subject to reasonably consistent application, but see U. S. General Accounting Office, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Reform, House of Representatives, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, GAO–04–297, pp. 3–4 (Feb. 2004), http://www.gao.gov/new.items/d04297.pdf (noting variation in results among Corps district offices), it may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute "navigable waters" under the Act. Yet the breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC.* Cf. Leibowitz & Nadeau, Isolated Wetlands: State-of-the-Science and Future Directions, 23 Wetlands 663, 669 (2003) (noting that "'isolated' is generally a matter of degree").

When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps' regulations, this showing is necessary to avoid unreasonable applications of the statute. Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region. That issue, however, is neither raised by these facts nor addressed by any agency regulation that accommodates the nexus requirement outlined here.

This interpretation of the Act does not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption. To be sure, the significant-nexus requirement may not align perfectly with the traditional extent of federal authority. Yet in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty. Cf. *Pierce County* v. *Guillen,* 537 U. S. 129, 147 (2003) (upholding federal legislation "aimed at improving safety in the channels of commerce"); *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.,* 313 U. S. 508, 525–526 (1941) ("[J]ust as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries . . . . [T]he exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce"). As explained earlier, moreover, and as exemplified by *SWANCC*, the significant-nexus test itself prevents problematic applications of the statute. See *supra*, at 776; 531 U. S., at 174. The possibility of legitimate Commerce Clause and federalism concerns in some circumstances does not require the adoption of an interpretation that departs in all cases from the Act's text and structure. See *Gonzales* v. *Raich*, 545 U. S. 1, 17 (2005) ("[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence" (internal quotation marks omitted)).

## III

In both the consolidated cases before the Court the record contains evidence suggesting the possible existence of a significant nexus according to the principles outlined above. Thus the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps' assertion of jurisdiction is valid. Given, however, that neither the agency nor the reviewing courts properly considered the issue, a remand is appropriate, in my view, for application of the controlling legal standard.

### *Rapanos*

As the dissent points out, in *Rapanos*, No. 04–1034, an expert whom the District Court found "eminently qualified" and "highly credible," App. to Pet. for Cert. B7, testified that the wetlands were providing "habitat, sediment trapping, nutrient recycling, and flood peak diminution, reduction flow water augmentation." 4 Tr. 96 (Apr. 5, 1999). Although the expert had "not studied the upstream drainage of these sites" and thus could not assert that the wetlands were performing important pollutant-trapping functions, *ibid.*, he did observe:

> "we have a situation in which the flood water attenuation in that water is held on the site in the wetland . . . such that it does not add to flood peak. By the same token it would have some additional water flowing into the rivers during the drier periods, thus, increasing the low water flow. . . . By the same token on all of the sites to the extent that they slow the flow of water off of the site they will also accumulate sediment and thus trap sediment and hold nutrients for use in those wetlands systems later in the season as well," *id.*, at 95–96.

In addition, in assessing the hydrology prong of the three-part wetlands test, see *supra*, at 761–762, the District Court made extensive findings regarding water tables and drainage on the parcels at issue. In applying the Corps' jurisdictional regulations, the District Court found that each of the wetlands bore surface-water connections to tributaries of navigable-in-fact waters.

Much the same evidence should permit the establishment of a significant nexus with navigable-in-fact waters, particularly if supplemented by further evidence about the significance of the tributaries to which the wetlands are connected. The Court of Appeals, however, though recognizing that under *SWANCC* such a nexus was required for jurisdiction, held that a significant nexus "can be satisfied by the presence of a hydrologic connection." 376 F. 3d, at 639. Absent some measure of the significance of the connection for downstream water quality, this standard was too uncertain. Under the analysis described earlier, *supra*, at 779–780, 782, mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood. In my view this case should be remanded so that the District Court may reconsider the evidence in light of the appropriate standard. See, *e. g., Pullman-Standard* v. *Swint,* 456 U. S. 273, 291 (1982) ("When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings").

### *Carabell*

In *Carabell,* No. 04–1384, the record also contains evidence bearing on the jurisdictional inquiry. The Corps noted in deciding the administrative appeal that "[b]esides the effects on wildlife habitat and water quality, the [district office] also noted that the project would have a major, long-term detrimental effect on wetlands, flood retention, recreation and conservation and overall ecology," App. 218a. Similarly, in the district office's permit evaluation, Corps officers observed:

> "The proposed work would destroy/adversely impact an area that retains rainfall and forest nutrients and would replace it with a new source area for runoff pollutants. Pollutants from this area may include lawn fertilizers, herbicides, pesticides, road salt, oil, and grease. These pollutants would then runoff directly into the waterway. . . . Overall, the operation and use of the proposed activity would have a major, long term, negative impact on water quality. The cumulative impacts of numerous such projects would be major and negative as the few remaining wetlands in the area are developed." *Id.,* at 97a–98a.

The Corps' evaluation further noted that by "eliminat[ing] the potential ability of the wetland to act as a sediment catch basin," the proposed project "would contribute to increased runoff and . . . accretion along the drain and further downstream in Auvase Creek." *Id.,* at 98a. And it observed that increased runoff from the site would likely cause downstream areas to "see an increase in possible flooding magnitude and frequency." *Id.,* at 99a.

The conditional language in these assessments—"potential ability," "possible flooding"—could suggest an undue degree of speculation, and a reviewing court must identify substantial evidence supporting the Corps' claims, see 5 U. S. C. § 706(2)(E). Nevertheless, the record does show that factors relevant to the jurisdictional inquiry have already been noted and considered. As in *Rapanos,* though, the record gives little indication of the quantity and regularity of flow in the adjacent tributaries—a consideration that may be important in assessing the nexus. Also, as in *Rapanos,* the legal standard applied to the facts was imprecise.

The Court of Appeals, considering the *Carabell* case after its *Rapanos* decision, framed the inquiry in terms of whether hydrologic connection is required to establish a significant nexus. The court held that it is not, and that much of its holding is correct. Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system. In the administrative decision under review, however, the Corps based its jurisdiction solely on the wetlands' adjacency to the ditch opposite the berm on the property's edge. As explained earlier, mere adjacency to a tributary of this sort is insufficient; a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow toward it. A more specific inquiry, based on the significant-nexus standard, is therefore necessary. Thus, a remand is again required to permit application of the appropriate legal standard. See, *e. g., INS* v. *Orlando Ventura,* 537 U. S. 12, 16 (2002) *(per curiam)* ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands").

* * *

In these consolidated cases I would vacate the judgments of the Court of Appeals and remand for consideration whether the specific wetlands at issue possess a significant nexus with navigable waters.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

In 1972, Congress decided to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by passing what we now call the Clean Water Act, 86 Stat. 816, as amended, 33 U. S. C. § 1251 *et seq.* The costs of achieving the Herculean goal of ending water pollution by 1985, see § 1251(a), persuaded President Nixon to veto its enactment, but both Houses of Congress voted to override that veto by overwhelming margins. To achieve its goal, Congress prohibited "the discharge of any pollutant"—defined to include "any addition of any pollutant to navigable waters from any point source"—without a permit issued by the Army Corps of Engineers (Army Corps or Corps) or the Environmental Protection Agency (EPA). §§ 1311(a), 1362(12)(A). Congress further defined "navigable waters" to mean "the waters of the United States." § 1362(7).

The narrow question presented in No. 04–1034 is whether wetlands adjacent to tributaries of traditionally navigable waters are "waters of the United States" subject to the jurisdiction of the Army Corps; the question in No. 04–1384 is whether a manmade berm separating a wetland from the adjacent tributary makes a difference. The broader question is whether regulations that have protected the quality of our waters for decades, that were implicitly approved by Congress, and that have been repeatedly enforced in case after case, must now be revised in light of the creative criticisms voiced by the plurality and JUSTICE KENNEDY today. Rejecting more than 30 years of practice by the Army Corps, the plurality disregards the nature of the congressional delegation to the agency and the technical and complex character of the issues at stake. JUSTICE KENNEDY similarly fails to defer sufficiently to the Corps, though his approach is far more faithful to our precedents and to principles of statutory interpretation than is the plurality's.

In my view, the proper analysis is straightforward. The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. The Corps' resulting decision to treat these wetlands as encompassed within the term "waters of the United States" is a quintessential example of the Executive's reasonable interpretation of a statutory provision. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984).

Our unanimous decision in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121 (1985), was faithful to our duty to respect the work product of the Legislative and Executive Branches of our Government. Today's judicial amendment of the Clean Water Act is not.

## I

At each of the three sites at issue in No. 04–1034, the petitioners filled large areas of wetlands without permits, despite being on full notice of the Corps' regulatory requirements. Because the plurality gives short shrift to the facts of this case—as well as to those of No. 04–1384—I shall discuss them at some length.

The facts related to the 230-acre Salzburg site are illustrative. In 1988, John Rapanos asked the Michigan Department of Natural Resources (MDNR) to inspect the site "in order to discuss with him the feasibility of building a shopping center there." App. to Pet. for Cert. in No. 04–1034, p. B15. An MDNR inspector informed Rapanos that the land probably included wetlands that were "waters of the United States" and sent him an application for a permit under § 404 of the Act.[1] Rapanos then hired a wetland consultant, Dr. Frederick Goff. After Dr. Goff concluded that the land did in fact contain many acres of wetlands, "Rapanos threatened to 'destroy' Dr. Goff if he did not destroy the wetland report, and refused to pay Dr. Goff unless and until he complied." *Ibid.* In the meantime, without applying for a permit, Rapanos hired construction companies to do $350,000 worth of work clearing the land, filling in low spots, and draining subsurface water. After Rapanos prevented MDNR inspectors from visiting the site, ignored an MDNR cease-and-desist letter, and refused to obey an administrative compliance order issued by the EPA, the matter was referred to the Department of Justice. In the civil case now before us, the District Court found that Rapanos unlawfully filled 22 acres of wetlands.

Rapanos and his wife engaged in similar behavior at the Hines Road and Pine River sites. Without applying for § 404 permits, they hired construction companies to perform extensive clearing and filling activities. They continued these activities even after receiving EPA administrative compliance orders directing them to cease the work immediately. They ultimately spent $158,000 at the 275-acre Hines Road site, filling 17 of its existing 64 acres of wetlands. At the 200-acre Pine River site, they spent $463,000 and filled 15 of its 49 acres of wetlands.

Prior to their destruction, the wetlands at all three sites had surface connections to tributaries of traditionally navigable waters. The Salzburg wetlands connected to a drain that flows into a creek that flows into the navigable Kawkawlin River. The Hines Road wetlands connected to a drain that flows into the navigable Tittabawassee River. And the Pine River wetlands connected with the Pine River, which flows into Lake Huron.

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[1] Pursuant to 33 U. S. C. §§ 1344(g)–(h), Michigan operates its own § 404 permitting program, subject to supervision from the Army Corps.

At trial, the Government put on a wetland expert, Dr. Daniel Willard, whom the trial court found "eminently qualified" and "highly credible." *Id.*, at B7. Dr. Willard testified that the wetlands at these three sites provided ecological functions in terms of "habitat, sediment trapping, nutrient recycling, and flood peak diminution." 4 Tr. 96 (Apr. 5, 1999).[2] He explained:

> "[G]enerally for all of the . . . sites we have a situation in which the flood water attenuation in that water is held on the site in the wetland . . . such that it does not add to flood peak. By the same token it would have some additional water flowing into the rivers during the drier periods, thus, increasing low water flow.
>
> . . . . .
>
> "By the same token on all of the sites to the extent that they slow the flow of water of the site they will also accumulate sediment and thus trap sediment and hold nutrients for use in those wetland systems later in the season as well." *Id.*, at 95–96.

The District Court found that the wetlands at all three sites were covered by the Clean Water Act and that the Rapanoses had violated the Act by destroying them without permits. The Sixth Circuit unanimously affirmed. 376 F. 3d 629 (2004).

The facts of No. 04–1384 are less dramatic. The petitioners in that case own a 20-acre tract of land, of which 16 acres are wetlands, located in Macomb County a mile from Lake

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[2] Dr. Willard did not "stud[y] the upstream drainage of these sites . . . well enough to make a statement" about whether they also performed pollutant-trapping functions. 4 Tr. 96.

St. Clair. These wetlands border a ditch that flows into a drain that flows into a creek that flows into Lake St. Clair. A 4-foot-wide manmade berm separates the wetlands from the ditch; thus water rarely if ever passes from wetlands to ditch or vice versa.

Petitioners applied for a permit to fill most of these wetlands with 57,500 cubic yards of material. They intended to build a 112-unit condominium development on the site. After inspecting the site and considering comments from, among others, the Water Quality Unit of the Macomb County Prosecutor's Office (which urged the Corps to deny the permit because "[t]he loss of this high quality wetland area would have an unacceptable adverse effect on wildlife, water quality, and conservation of wetlands resources," App. in No. 04–1384, p. 79a), the Corps denied the permit. *Id.*, at 84a–126a. As summarized in a letter sent to petitioners, reasons for denial included:

> "Your parcel is primarily a forested wetland that provides valuable seasonal habitat for aquatic organisms and year round habitat for terrestrial organisms. Additionally, the site provides water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oemig Drain, Auvase Creek, and Lake St. Clair. The minimization of impacts to these wetlands is important for conservation and the overall ecology of the region. Because the project development area is a forested wetland, the proposed project would destroy the resources in such a manner that they would not soon recover from impacts of the discharges. The extent of impacts in the project area when considered both individually and cumulatively would be unacceptable and contrary to the public interest." *Id.*, at 127a–128a.

As in No. 04–1034, the unanimous judgment of the District and Circuit Judges was that the Corps has jurisdiction over this wetland because it is adjacent to a tributary of traditionally navigable waters. 391 F. 3d 704 (CA6 2004). The Solicitor General defends both judgments.

## II

Our unanimous opinion in *Riverside Bayview* squarely controls these cases. There, we evaluated the validity of the very same regulations at issue today. These regulations interpret "waters of the United States" to cover all traditionally navigable waters; tributaries of these waters; and wetlands adjacent to traditionally navigable waters or their tributaries. 33 CFR §§ 328.3(a)(1), (5), and (7) (2005); §§ 323.2(a)(1), (5), and (7) (1985). Although the particular wetland at issue in *Riverside Bayview* abutted a navigable creek, we framed the question presented as whether the Clean Water Act "authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water *and their tributaries.*" 474 U. S., at 123 (emphasis added).[3]

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[3] By contrast, we "d[id] not express any opinion" on the Corps' additional assertion of jurisdiction over "wetlands that are not adjacent to bodies of open water, see 33 CFR §§ 323.2(a)(2) and (3) (1985)." 474 U. S., at 131–132, n. 8; see also *id.*, at 124, n. 2 (making the same reservation). Contrary to JUSTICE KENNEDY's reading, *ante,* at 780 (opinion concurring in judgment), we were not reserving the issue of the Corps' jurisdiction over wetlands adjacent to tributaries, but only reserving the issue of the Corps' jurisdiction over truly isolated waters. A glance at the cited regulation makes this clear. Section 323.2(a)(2) refers to "[a]ll interstate waters including interstate wetlands" and § 323.2(a)(3) covers "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters." See also *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers,* 531 U. S. 159, 163–164 (2001) (considering the validity of an application of § 328.3(a)(3) (1999), which is substantively identical to § 323.2(a)(3) (1985) and to § 323.2(a)(5) (1978)). Wetlands adjacent to tributaries of traditionally navigable waters were covered in the 1985

We held that, pursuant to our decision in *Chevron,*

> "our review is limited to the question whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'" 474 U. S., at 131.

Applying this standard, we held that the Corps' decision to interpret "waters of the United States" as encompassing such wetlands was permissible. We recognized the practical difficulties in drawing clean lines between land and water, *id.,* at 132, and deferred to the Corps' judgment that treating adjacent wetlands as "waters" would advance the "congressional concern for protection of water quality and aquatic ecosystems," *id.,* at 133.

Contrary to the plurality's revisionist reading today, *ante,* at 740–742, 746–747, *Riverside Bayview* nowhere implied that our approval of "adjacent" wetlands was contingent upon an understanding that "adjacent" means having a "continuous surface connection" between the wetland and its neighboring creek, *ante,* at 742. Instead, we acknowledged that the Corps defined "adjacent" as including wetlands "'that form the border of or are in reasonable proximity to other waters'" and found that the Corps reasonably concluded that adjacent wetlands are part of the waters of the United States. 474 U. S., at 134 (quoting 42 Fed. Reg. 37128 (1977)). Indeed, we explicitly acknowledged that the Corps' jurisdictional determination was reasonable even though

> "not every adjacent wetland is of great importance to the environment of adjoining bodies of water. . . . If it is

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regulation by other provisions of the regulation, namely, a combination of §§323.2(a)(1) (covering traditionally navigable waters), (4) (covering tributaries of subsection (a)(1) waters), and (7) (covering wetlands adjacent to subsection (a)(4) waters).

> reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment . . . the Corps may always allow development of the wetland for other uses simply by issuing a permit." 474 U. S., at 135, n. 9.

In closing, we emphasized that the scope of the Corps' asserted jurisdiction over wetlands had been specifically brought to Congress' attention in 1977, that Congress had rejected an amendment that would have narrowed that jurisdiction, and that even proponents of the amendment would not have removed wetlands altogether from the definition of "waters of the United States." *Id.*, at 135–139.

Disregarding the importance of *Riverside Bayview*, the plurality relies heavily on the Court's subsequent opinion in *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers*, 531 U. S. 159 (2001) *(SWANCC)*. In stark contrast to *Riverside Bayview*, however, *SWANCC* had nothing to say about wetlands, let alone about wetlands adjacent to traditionally navigable waters or their tributaries. Instead, *SWANCC* dealt with a question specifically reserved by *Riverside Bayview*, see n. 3, *supra*, namely, the Corps' jurisdiction over isolated waters—" 'waters that are *not* part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.' " 531 U. S., at 168–169 (quoting 33 CFR § 323.2(a)(5) (1978); emphasis added); see also 531 U. S., at 163 (citing 33 CFR § 328.2(a)(3) (1999), which is the later regulatory equivalent to § 323.2(a)(5) (1978)). At issue in *SWANCC* was "an abandoned sand and gravel pit . . . which provide[d] habitat for migratory birds" and contained a few pools of "nonnavigable, isolated, intrastate waters." 531 U. S., at 162, 166. The Corps had asserted jurisdiction over the gravel pit under its 1986 Migratory Bird Rule, which treated isolated waters as within its jurisdiction if migratory birds depended upon these waters. The Court rejected this jurisdictional basis since these isolated pools, unlike the wetlands at issue in *Riverside Bayview,* had no "significant nexus" to traditionally navigable waters. 531 U. S., at 167. In the process, the Court distinguished *Riverside Bayview's* reliance on Congress' decision to leave the Corps' regulations alone when it amended the Act in 1977, since "'[i]n both Chambers, debate on the proposals to narrow the definition of navigable waters centered largely on the issue of wetlands preservation'" rather than on the Corps' jurisdiction over truly isolated waters. 531 U. S., at 170 (quoting 474 U. S., at 136).[4]

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[4] As THE CHIEF JUSTICE observes, the Corps and the EPA initially considered revising their regulations in response to *SWANCC. Ante,* at 757–758 (concurring opinion). THE CHIEF JUSTICE neglects to mention, however, that almost all of the 43 States to submit comments opposed any significant narrowing of the Corps' jurisdiction—as did roughly 99% of the 133,000 other comment submitters. See U. S. General Accounting Office, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Government Reform, House of Representatives, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, GAO–04–297, pp. 14–15 (Feb. 2004), http://www.gao.gov/new.items/d04297.pdf (hereinafter GAO Report) (all Internet materials as visited June 14, 2006, and available in Clerk of Court's case file); Brief for Association of State and Interstate Water Pollution Control Administrators as *Amicus Curiae.* In any event, the agencies' decision to abandon their rulemaking is hardly responsible for the cases at hand. The proposed rulemaking focused on isolated waters, which are covered by 33 CFR §328.3(a)(3) (1999) and which were called into question by *SWANCC,* rather than on wetlands adjacent to tributaries of navigable waters, which are covered by a combination of §§328.3(a)(1), (5), and (7) and which (until now) seemed obviously within the agencies' jurisdiction in light of *Riverside Bayview.* See 68 Fed. Reg. 1994 (2003) ("The agencies seek comment on the use of the factors in 33 CFR 328.3(a)(3)(i)–(iii) . . . in determining

Unlike *SWANCC* and like *Riverside Bayview,* the cases before us today concern wetlands that are adjacent to "navigable bodies of water [or] their tributaries," 474 U. S., at 123. Specifically, these wetlands abut tributaries of traditionally navigable waters. As we recognized in *Riverside Bayview,* the Corps has concluded that such wetlands play important roles in maintaining the quality of their adjacent waters, see *id.,* at 134–135, and consequently in the waters downstream. Among other things, wetlands can offer "nesting, spawning, rearing and resting sites for aquatic or land species"; "serve as valuable storage areas for storm and flood waters"; and provide "significant water purification functions." 33 CFR §320.4(b)(2) (2005); 474 U. S., at 134–135. These values are hardly "*independent*" ecological considerations as the plurality would have it, *ante,* at 741—instead, they are integral to the "chemical, physical, and biological integrity of the Nation's waters," 33 U. S. C. §1251(a). Given that wetlands serve these important water quality roles and given the ambiguity inherent in the phrase "waters of the United States," the Corps has reasonably interpreted its jurisdiction to cover nonisolated wetlands. See 474 U. S., at 131–135.[5]

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[Clean Water Act] jurisdiction over isolated, intrastate, non-navigable waters").

[5] Unsurprisingly, most Courts of Appeals to consider the scope of the Corps' jurisdiction after *SWANCC* have unhesitatingly concluded that this jurisdiction covers intermittent tributaries and wetlands adjacent—in the normal sense of the word—to traditionally navigable waters and their tributaries. *E. g., United States* v. *Deaton,* 332 F. 3d 698 (CA4 2003) (upholding the Corps' jurisdiction over wetlands adjacent to a ditch that might not contain consistently flowing water but did drain into another ditch that drained into a creek that drained into a navigable waterway); *Headwaters, Inc.* v. *Talent Irrigation Dist.,* 243 F. 3d 526 (CA9 2001) (treating as "waters of the United States" canals that held water intermittently and connected to other tributaries of navigable waters); *United States* v. *Rueth Development Co.,* 335 F. 3d 598, 604 (CA7 2003) (observing "it is clear that *SWANCC* did not affect the law regarding . . . adjacency" in upholding the Corps' jurisdiction over a wetland without finding that this wetland had a continuous surface connection to its adjacent tributary); *Baccarat Fre-*

This conclusion is further confirmed by Congress' deliberate acquiescence in the Corps' regulations in 1977. *Id.*, at 136. Both Chambers conducted extensive debates about the Corps' regulatory jurisdiction over wetlands, rejected efforts to limit this jurisdiction, and appropriated funds for a "'National Wetlands Inventory'" to help the States "'in the development and operation of programs under this Act.'" *Id.*, at 135–139 (quoting 33 U. S. C. § 1288(i)(2)). We found these facts significant in *Riverside Bayview*, see 474 U. S., at 135–139, as we acknowledged in *SWANCC*, see 531 U. S., at 170–171 (noting that *"[b]eyond Congress' desire to regulate wetlands adjacent to 'navigable waters,'* respondents point us to no persuasive evidence" of congressional acquiescence (emphasis added)).

The Corps' exercise of jurisdiction is reasonable even though not every wetland adjacent to a traditionally navigable water or its tributary will perform all (or perhaps any) of the water quality functions generally associated with wetlands. *Riverside Bayview* made clear that jurisdiction does not depend on a wetland-by-wetland inquiry. 474 U. S., at 135, n. 9. Instead, it is enough that wetlands adjacent to tributaries generally have a significant nexus to the watershed's water quality. If a particular wetland is "not significantly intertwined with the ecosystem of adjacent waterways," then the Corps may allow its development "simply by issuing a permit." *Ibid.*[6] Accordingly, for purposes of the Corps' jurisdiction it is of no significance that the wetlands in No. 04–1034 serve flood control and sediment sink func-

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*mont* v. *U. S. Army Corps of Engineers*, 425 F. 3d 1150, 1156 (CA9 2005) (upholding the Corps' jurisdiction over wetlands separated by berms from traditionally navigable channels and observing that "*SWANCC* simply did not address the issue of jurisdiction over adjacent wetlands"); but see *In re Needham*, 354 F. 3d 340 (CA5 2003) (reading "waters of the United States" narrowly as used in the Oil Pollution Act of 1990).

[6] Indeed, "[t]he Corps approves virtually all section 404 permit[s]," though often requiring applicants to avoid or mitigate impacts to wetlands and other waters. GAO Report 8.

tions, but may not do much to trap other pollutants, *supra,* at 790, and n. 2, or that the wetland in No. 04–1384 keeps excess water from Lake St. Clair but may not trap sediment, see *supra,* at 790–792.

Seemingly alarmed by the costs involved, the plurality shies away from *Riverside Bayview*'s recognition that jurisdiction is not a case-by-case affair. I do not agree with the plurality's assumption that the costs of preserving wetlands are unduly high. It is true that the cost of § 404 permits are high for those who must obtain them[7]—but these costs amount to only a small fraction of 1% of the $760 billion spent each year on private and public construction and development activity. Sunding & Zilberman 80. More significant than the plurality's exaggerated concern about costs, however, is the fact that its omission of any discussion of the benefits that the regulations at issue have produced sheds a revelatory light on the quality (and indeed the impartiality) of its cost-benefit analysis.[8] The importance of wetlands for water quality is hard to overstate. See, *e. g.*, U. S. Congress, Office of Technology Assessment, Wetlands: Their Use and Regulation, OTA–O–206, pp. 43–61 (Mar. 1984), http://govinfo.library.unt.edu/ota/OTA_4/DATA/1984/8433.pdf (hereinafter OTA) (describing wetlands' role in floodpeak reduction, shoreline protection, ground water recharge, trapping of suspended sediment, filtering of toxic pollutants, and protection of fish and wildlife). See also *ante*, at 777 (KENNEDY, J., concurring in judgment). Unsurprisingly, the Corps' approach has the overwhelming endorsement of numerous *amici curiae*, including 33 States and the county in which the property in No. 04–1384 is located.

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[7] According to the Sunding and Zilberman article cited by the plurality, *ante,* at 721, for 80% of permits the mean cost is about $29,000 (with a median cost of about $12,000). The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process, 42 Natural Resources J. 59, 63, 74 (2002) (hereinafter Sunding & Zilberman). Only for less than 20% of the permits—those for projects with the most significant impacts on wetlands—is the mean cost around $272,000 (and the median cost is $155,000). *Ibid.*

Of course, not every placement of fill or dredged material into the waters of the United States requires a § 404 permit. Only when such fill comes from point sources—"discernible, confined and discrete conveyance[s]"—is a § 404 permit needed. 33 U. S. C. §§ 1362(12), (14). Moreover, permits are not required for discharges from point sources engaged in, among other things, normal farming activities; maintenance of transportation structures; and construction of irrigation ditches, farm roads, forest roads, and temporary mining roads. § 1344(f).

[8] Rather than defending its own antagonism to environmentalism, the plurality counters by claiming that my dissent is "policy-laden." *Ante,* at 746. The policy considerations that have influenced my thinking are Congress' rather than my own. In considering whether the Corps' interpretation of its jurisdiction is reasonable, I am admittedly taking into ac-

In final analysis, however, concerns about the appropriateness of the Corps' 30-year implementation of the Clean Water Act should be addressed to Congress or the Corps rather than to the Judiciary. Whether the benefits of particular conservation measures outweigh their costs is a classic question of public policy that should not be answered by appointed judges. The fact that large investments are required to finance large developments merely means that those who are most adversely affected by the Corps' permitting decisions are persons who have the ability to communicate effectively with their representatives. Unless and until they succeed in convincing Congress (or the Corps) that clean water is less important today than it was in the 1970's, we continue to owe deference to regulations satisfying the "evident breadth of congressional concern for protection of water quality and aquatic ecosystems" that all of the Justices on the Court in 1985 recognized in ***Riverside Bayview***, 474 U. S., at 133.

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count the congressional purpose of protecting the physical, chemical, and biological integrity of our waters. See 33 U. S. C. § 1251(a); see also *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 863 (1984) (considering whether the agency regulation was consistent with "the policy concerns that motivated the [Clean Air Act's] enactment").

## III

Even setting aside the plurality's dramatic departure from our reasoning and holding in *Riverside Bayview*, its creative opinion is utterly unpersuasive. The plurality imposes two novel conditions on the exercise of the Corps' jurisdiction that can only muddy the jurisdictional waters. As JUSTICE KENNEDY observes, "these limitations . . . are without support in the language and purposes of the Act or in our cases interpreting it." *Ante*, at 768 (opinion concurring in judgment). The impropriety of crafting these new conditions is highlighted by the fact that *no* party or *amicus* has suggested either of them.[9]

First, ignoring the importance of preserving jurisdiction over water beds that are periodically dry, the plurality imposes a requirement that only tributaries with the "relatively permanent" presence of water fall within the Corps' jurisdiction. *Ante*, at 732. Under the plurality's view, then, the Corps can regulate polluters who dump dredge into a stream that flows year round but may not be able to regulate polluters who dump into a neighboring stream that flows for only 290 days of the year—even if the dredge in this second stream would have the same effect on downstream waters as the dredge in the year-round one. *Ante*, at 732–733, n. 5.[10]

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[9] Only 3 of the 21 *amici* briefs filed on petitioners' behalf come even close to asking for one of the plurality's two conditions. These briefs half-argue that intermittent streams should fall outside the Corps' jurisdiction—though not for the reasons given by the plurality. See Brief for National Stone, Sand and Gravel Assn. et al. 20, n. 7; Brief for Foundation for Environmental and Economic Progress et al. 22–23; Brief for Western Coalition of Arid States 10.

[10] The plurality does suggest that "*seasonal* rivers" are not "necessarily exclude[d]" from the Corps' jurisdiction—and then further suggests that "streams" are "rivers." *Ante*, at 732, n. 5. I will not explore the semantic issues posed by the latter point. On the former point, I have difficulty understanding how a "seasonal" river could meet the plurality's test of having water present "relatively permanent[ly]." By failing to explain

To find this arbitrary distinction compelled by the statute, the plurality cites a dictionary for a proposition that it does not contain. The dictionary treats "streams" as "waters" but has nothing to say about whether streams must contain water year round to qualify as "streams." *Ante*, at 732–733, and n. 6 (citing Webster's New International Dictionary 2493 (2d ed. 1954) (hereinafter Webster's Second), as defining stream as a " 'current or course of water or other fluid, flowing on the earth' "). From this, the plurality somehow deduces that streams can never be intermittent or ephemeral (*i. e.*, flowing for only part of the year). *Ante*, at 732–734, and nn. 5–6. But common sense and common usage demonstrate that intermittent streams, like perennial streams, are still streams.[11] See, *e. g.*, U. S. Dept. of Interior, U. S. Geological Survey, Topographic Map Symbols 3 (2005), http://erg.usgs.gov/isb/pubs/booklets/symbols/ (identifying symbols for "[p]erennial stream" and "[i]ntermittent stream," as well as for "[p]erennial river" and "[i]ntermittent river"). This was true well before the passage of the Act in 1972. *E. g.*, Webster's Third New International Dictionary 1180 (1961) (hereinafter Webster's Third) (linking "intermittent" with "stream"). Indeed, we ourselves have used the term "intermittent stream" as far back as 1932. *Harrisonville* v. *W. S. Dickey Clay Mfg. Co.*, 289 U. S. 334, 335 (1933). Needless to say, Justice Brandeis' use of the term in a unanimous opinion should not be dismissed as merely a "useful oxymor[on]," *ante*, at 733, n. 6 (plurality opinion).

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itself, the plurality leaves litigants without guidance as to where the line it draws between "relatively permanent" and "intermittent" lies.

[11] Indeed, in the 1977 debate over whether to restrict the scope of the Corps' regulatory power, Senator Bentsen recognized that the Corps' jurisdiction "cover[s] all waters of the United States, including small streams, ponds, isolated marshes, and intermittently flowing gullies." 4 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Senate Committee on Environment and Public Works by the Library of Congress), Ser. No. 95–14, p. 903 (1978). His proposed amendment to restrict this jurisdiction failed. *Id.*, at 947.

The plurality attempts to bolster its arbitrary jurisdictional line by citing two tangential statutory provisions and two inapplicable canons of construction. None comes close to showing that Congress directly spoke to whether "waters" requires the relatively permanent presence of water.

The first provision relied on by the plurality—the definition of "point source" in 33 U. S. C. § 1362(14)—has no conceivable bearing on whether permanent tributaries should be treated differently from intermittent ones, since "pipe[s], ditch[es], channel[s], tunnel[s], conduit[s], [and] well[s]" can all hold water permanently as well as intermittently.[12] The second provision is § 1251(b), which announces a congressional policy to "recognize, preserve, and protect the primary responsibilities and rights of States" to prevent pollution, to plan development, and to consult with the EPA. Under statutory additions made in 1977 when Congress considered and declined to alter the Corps' interpretation of its broad regulatory jurisdiction, the States may run their own § 404 programs. §§ 1344(g)–(h). As modified, § 1251(b) specifically recognizes this role for the States as part of their primary responsibility for preventing water pollution. Even focusing only on the Act as it stood between 1972 and 1977, but see *International Paper Co.* v. *Ouellette*, 479 U. S. 481, 489–490 (1987) (interpreting § 1251(b) in light of the 1977 additions), broad exercise of jurisdiction by the Corps still left the States with ample rights and responsibilities. See *S. D. Warren Co.* v. *Maine Bd. of Environmental Protection, ante*, at 386–387. States had the power to impose tougher water pollution standards than required by the Act, § 1370, and to prevent the Corps and the EPA from issuing permits, § 1341(a)(1)—not to mention nearly exclusive responsibility for containing pollution from nonpoint sources.

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[12] The plurality's reasoning to the contrary is mystifying. The plurality emphasizes that a ditch around a castle is also called a "moat" and that a navigable manmade channel is called a "canal." See *ante,* at 736, n. 7. On their face (and even after much head scratching), these points have nothing to do with whether we use the word "stream" rather than "ditch" where permanently present water is concerned. Indeed, under the plurality's reasoning, we would call a "canal" a "stream" or a "river" rather than a "canal."

Moreover, we do use words like "ditch" without regard to whether water is present relatively permanently. In *Jennison* v. *Kirk,* 98 U. S. 453 (1879), for example, Justice Field used the term "ditch"—not "stream"—in describing a manmade structure that carried water year round. See also, *e. g., Knoxville Water Co.* v. *Knoxville,* 200 U. S. 22, 27 (1906) (opinion for the Court by Harlan, J.) (describing "pipes" that would continuously carry water); *ante,* at 739, 742 (plurality opinion) (using "channel" with reference to both intermittent and relatively permanent waters); *PUD No. 1 of Jefferson Cty.* v. *Washington Dept. of Ecology,* 511 U. S. 700, 709 (1994) (describing a "tunnel" that would carry water year round); *New Orleans Water-Works Co.* v. *Rivers,* 115 U. S. 674, 683 (1885) (opinion for the Court by Harlan, J.) (describing "conduits" that would supply water for a hotel). The plurality's attempt to achieve its desired outcome by redefining terms does no credit to lexicography—let alone to justice.

The two canons of construction relied on by the plurality similarly fail to overcome the deference owed to the Corps. First, the plurality claims that concerns about intruding on state power to regulate land use compel the conclusion that the phrase "waters of the United States" does not cover intermittent streams. As we have recognized, however, Congress found it " 'essential that discharge of pollutants be controlled at the source,' " *Riverside Bayview*, 474 U. S., at 133 (quoting S. Rep. No. 92–414, p. 77 (1972)), and the Corps can define "waters" broadly to accomplish this aim. Second, the plurality suggests that the canon of constitutional avoidance applies because the Corps' approach might exceed the limits of our Commerce Clause authority. Setting aside whether such a concern was proper in *SWANCC*, 531 U. S., at 173; but see *id.*, at 192–196 (STEVENS, J., dissenting), it is plainly not warranted here. The wetlands in these cases are not "isolated" but instead are adjacent to tributaries of traditionally navigable waters and play important roles in the watershed, such as keeping water out of the tributaries or absorbing water from the tributaries. "There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on navigable streams and their tributaries." *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508, 525 (1941).

Most importantly, the plurality disregards the fundamental significance of the Clean Water Act. As then-Justice Rehnquist explained when writing for the Court in 1981, the Act was "not merely another law" but rather was "viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation." *Milwaukee* v. *Illinois*, 451 U. S. 304, 317. "Congress' intent in enacting the [Act] was clearly to establish an all-encompassing program of water pollution regulation," and "[t]he most casual perusal of the legislative history demonstrates that . . . views on the comprehensive nature of the legislation were practically universal." *Id.*, at 318, and n. 12; see also 531 U. S., at 177–181 (STEVENS, J., dissenting). The Corps has concluded that it must regulate pollutants at the time they enter ditches or streams with ordinary high-water marks—whether perennial, intermittent, or ephemeral—in order to properly control water pollution. 65 Fed. Reg. 12823 (2000). Because there is ambiguity in the phrase "waters of the United States" and because interpreting it broadly to cover such ditches and streams advances the purpose of the Act, the Corps' approach should command our deference. Intermittent streams can carry pollutants just as perennial streams can, and their regulation may prove as important for flood control purposes. The inclusion of all identifiable tributaries that ultimately drain into large bodies of water within the mantle of federal protection is surely wise.

The plurality's second statutory invention is as arbitrary as its first. Trivializing the significance of changing conditions in wetlands environments, the plurality imposes a separate requirement that "the wetland has a continuous surface connection" with its abutting waterway such that it is "difficult to determine where the 'water' ends and the 'wetland' begins." *Ante*, at 742. An "intermittent, physically remote hydrologic connection" between the wetland and other waters is not enough. *Ibid.* Under this view, wetlands that border traditionally navigable waters or their tributaries and perform the essential function of soaking up overflow waters during hurricane season—thus reducing flooding downstream—can be filled in by developers with impunity, as long as the wetlands lack a surface connection with the adjacent waterway the rest of the year.

The plurality begins reasonably enough by recognizing that the Corps may appropriately regulate all wetlands "'adjacent to'" other waters. *Ibid.* This recognition is wise, since the statutory text clearly accepts this standard. Title 33 U. S. C. § 1344(g)(1), added in 1977, includes "adjacent wetlands" in its description of "waters" and thus "expressly stated that the term 'waters' included adjacent wetlands." *Riverside Bayview,* 474 U. S., at 138. While this may not "conclusively determine the construction to be placed on the use of the term 'waters' elsewhere in the Act . . . , in light of the fact that the various provisions of the Act should be read *in pari materia,* it does at least suggest strongly that the term 'waters' as used in the Act does not necessarily exclude 'wetlands.'" *Id.,* at 138, n. 11.

The plurality goes on, however, to define "'adjacent to'" as meaning "with a continuous surface connection to" other water. *Ante,* at 742. It is unclear how the plurality reached this conclusion, though it plainly neglected to consult a dictionary. Even its preferred Webster's Second defines the term as "[l]ying near, close, *or* contiguous; neighboring; bordering on" and acknowledges that "[o]bjects are ADJACENT when they lie close to each other, but *not necessarily in actual contact.*" Webster's Second 32 (emphasis added); see also Webster's Third 26. In any event, the proper question is not how the plurality would define "adjacent," but whether the Corps' definition is reasonable.

The Corps defines "adjacent" as "bordering, contiguous, or neighboring," and specifies that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 CFR § 328.3(c) (2005). This definition is plainly reasonable, both on its face and in terms of the purposes of the Act. While wetlands that are physically separated from other waters may perform less valuable functions, this is a matter for the Corps to evaluate in its permitting decisions. We made this clear in *Riverside Bayview*, 474 U. S., at 135, n. 9—which did not impose the plurality's new requirement despite an absence of evidence that the wetland at issue had the sort of continuous surface connection required by the plurality today. See *supra*, at 793; see also *ante*, at 772–774 (KENNEDY, J., concurring in judgment) (observing that the plurality's requirement is inconsistent with *Riverside Bayview*). And as the facts of No. 04–1384 demonstrate, wetland separated by a berm from adjacent tributaries may still prove important to downstream water quality. Moreover, Congress was on notice of the Corps' definition of "adjacent" when it amended the Act in 1977 and added 33 U. S. C. § 1344(g)(1). See 42 Fed. Reg. 37129 (1977).

Finally, implicitly recognizing that its approach endangers the quality of waters which Congress sought to protect, the plurality suggests that the EPA can regulate pollutants before they actually enter the "waters of the United States." *Ante*, at 742–746. I express no view on the merits of the plurality's reasoning, which relies heavily on a respect for lower court judgments that is conspicuously lacking earlier in its opinion, *ante*, at 726–729.

I do fail to understand, however, why the plurality would not similarly apply this logic to dredged and fill material. The EPA's authority over pollutants (other than dredged and fill materials) stems from the identical statutory language that gives rise to the Corps' § 404 jurisdiction. The plurality claims that there is a practical difference, asserting that dredged and fill material "does not normally wash downstream." *Ante*, at 744. While more of this material will probably stay put than is true of soluble pollutants, the very existence of words like "alluvium" and "silt" in our language, see Webster's Third 59, 2119, suggests that at least some fill makes its way downstream. See also, *e. g., United States* v. *Deaton*, 332 F. 3d 698, 707 (CA4 2003) ("Any pollutant or fill material that degrades water quality in a tributary . . . has the potential to move downstream and degrade the quality of the navigable waters themselves"). Moreover, such fill can harm the biological integrity of downstream waters even if it largely stays put upstream. The Act's purpose of protecting fish, see 33 U. S. C. § 1251(a)(2); *S. D. Warren Co., ante*, at 385–386, could be seriously impaired by sediment in upstream waters where fish spawn, since excessive sediment can "smother bottom-dwelling invertebrates and impair fish spawning," OTA 48. See also, *e. g.*, Erman & Hawthorne, The Quantitative Importance of an Intermittent Stream in the Spawning of Rainbow Trout, 105 Transactions of the American Fisheries Society 675–681 (1976); Brief for American Rivers et al. as *Amici Curiae* 14 (observing that anadromous salmon often spawn in small, intermittent streams).

## IV

While I generally agree with Parts I and II–A of JUSTICE KENNEDY's opinion, I do not share his view that we should replace regulatory standards that have been in place for over 30 years with a judicially crafted rule distilled from the term "significant nexus" as used in *SWANCC*. To the extent that our passing use of this term has become a statutory requirement, it is categorically satisfied as to wetlands adjacent to navigable waters or their tributaries. *Riverside Bayview* and *SWANCC* together make this clear. *SWANCC's* only use of the term comes in the sentence: "It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the [Clean Water Act] in *Riverside Bayview*." 531 U. S., at 167. Because *Riverside Bayview* was written to encompass "wetlands adjacent to navigable waters and their tributaries," 474 U. S., at 123, and reserved only the question of isolated waters, see *id.*, at 131–132, n. 8; see also n. 3, *supra*, its determination of the Corps' jurisdiction applies to the wetlands at issue in these cases.

Even setting aside the apparent applicability of *Riverside Bayview*, I think it clear that wetlands adjacent to tributaries of navigable waters generally have a "significant nexus" with the traditionally navigable waters downstream. Unlike the "nonnavigable, isolated, intrastate waters" in *SWANCC*, 531 U. S., at 171, these wetlands can obviously have a cumulative effect on downstream water flow by releasing waters at times of low flow or by keeping waters back at times of high flow. This logical connection alone gives the wetlands the "limited" connection to traditionally navigable waters that is all the statute requires, see *id.*, at 172; 474 U. S., at 133—and disproves JUSTICE KENNEDY's claim that my approach gives no meaning to the word "'navigable,'" *ante*, at 779 (opinion concurring in judgment). Similarly, these wetlands can preserve downstream water quality by trapping sediment, filtering toxic pollutants, protecting fish-spawning grounds, and so forth. While there may exist categories of wetlands adjacent to tributaries of traditionally navigable waters that, taken cumulatively, have no plausibly discernible relationship to any aspect of downstream water quality, I am skeptical. And even given JUSTICE KENNEDY's "significant-nexus" test, in the absence of compelling evidence that many such categories do exist I see no reason to conclude that the Corps' longstanding regulations are overbroad.

JUSTICE KENNEDY's "significant-nexus" test will probably not do much to diminish the number of wetlands covered by the Act in the long run. JUSTICE KENNEDY himself recognizes that the records in both cases contain evidence that "should permit the establishment of a significant nexus," *ante*, at 783; see also *ante*, at 784, and it seems likely that evidence would support similar findings as to most (if not all) wetlands adjacent to tributaries of navigable waters. But JUSTICE KENNEDY's approach will have the effect of creating additional work for all concerned parties. Developers wishing to fill wetlands adjacent to ephemeral or intermittent tributaries of traditionally navigable waters will have no certain way of knowing whether they need to get § 404 permits or not. And the Corps will have to make case-by-case (or category-by-category) jurisdictional determinations, which will inevitably increase the time and resources spent processing permit applications. These problems are precisely the ones that *Riverside Bayview*'s deferential approach avoided. See 474 U. S., at 135, n. 9 (noting that it "is of little moment" if the Corps' jurisdiction encompasses some wetlands "not significantly intertwined" with other waters of the United States). Unlike JUSTICE KENNEDY, I see no reason to change *Riverside Bayview*'s approach—and every reason to continue to defer to the Executive's sensible, bright-line rule.

## V

As I explained in *SWANCC*, Congress passed the Clean Water Act in response to widespread recognition—based on events like the 1969 burning of the Cuyahoga River in Cleveland—that our waters had become appallingly polluted. 531 U. S., at 174–175 (dissenting opinion). The Act has largely succeeded in restoring the quality of our Nation's waters. Where the Cuyahoga River was once coated with industrial waste, "[t]oday, that location is lined with restaurants and pleasure boat slips." EPA, A Benefits Assessment of the Water Pollution Control Programs Since 1972, p. 1–2 (Jan. 2000), http://www.epa.gov/ost/economics/assessment.pdf. By curtailing the Corps' jurisdiction of more than 30 years, the plurality needlessly jeopardizes the quality of our waters. In doing so, the plurality disregards the deference it owes the Executive, the congressional acquiescence in the Executive's position that we recognized in *Riverside Bayview,* and its own obligation to interpret laws rather than to make them. While JUSTICE KENNEDY's approach has far fewer faults, nonetheless it also fails to give proper deference to the agencies entrusted by Congress to implement the Clean Water Act.

I would affirm the judgments in both cases, and respectfully dissent from the decision of five Members of this Court to vacate and remand. I close, however, by noting an unusual feature of the Court's judgments in these cases. It has been our practice in a case coming to us from a lower federal court to enter a judgment commanding that court to conduct any further proceedings pursuant to a specific mandate. That prior practice has, on occasion, made it necessary for Justices to join a judgment that did not conform to their own views.[13] In these cases, however, while both the plurality and JUSTICE KENNEDY agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand. Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or JUSTICE KENNEDY's test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met.[14]

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[13] See, *e. g., Screws* v. *United States,* 325 U. S. 91, 131–134 (1945) (Rutledge, J., concurring in result); *Turner Broadcasting System, Inc.* v. *FCC,* 512 U. S. 622, 674 (1994) (STEVENS, J., concurring in part and concurring in judgment); *Hamdi* v. *Rumsfeld,* 542 U. S. 507, 553–554 (2004) (SOUTER, J., concurring in part, dissenting in part, and concurring in judgment).

[14] I assume that JUSTICE KENNEDY's approach will be controlling in most cases because it treats more of the Nation's waters as within the Corps' jurisdiction, but in the unlikely event that the plurality's test is met but JUSTICE KENNEDY's is not, courts should also uphold the Corps' jurisdiction. In sum, in these and future cases the United States may elect to prove jurisdiction under either test.

JUSTICE BREYER, dissenting.

In my view, the authority of the Army Corps of Engineers under the Clean Water Act extends to the limits of congressional power to regulate interstate commerce. See *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers*, 531 U. S. 159, 181–182 (2001) *(SWANCC)* (STEVENS, J., dissenting). I therefore have no difficulty finding that the wetlands at issue in these cases are within the Corps' jurisdiction, and I join JUSTICE STEVENS' dissenting opinion.

My view of the statute rests in part upon the nature of the problem. The statute seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U. S. C. § 1251(a). Those waters are so various and so intricately interconnected that Congress might well have decided the only way to achieve this goal is to write a statute that defines "waters" broadly and to leave the enforcing agency with the task of restricting the scope of that definition, either wholesale through regulation or retail through development permissions. That is why I believe that Congress, in using the term "waters of the United States," § 1362(7), intended fully to exercise its relevant Commerce Clause powers.

I mention this because the Court, contrary to my view, has written a "nexus" requirement into the statute. *SWANCC, supra*, at 167; *ante*, at 779 (KENNEDY, J., concurring in judgment) ("[T]he Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense"). But it has left the administrative powers of the Army Corps of Engineers untouched. That agency may write regulations defining the term—something that it has not yet done. And the courts must give those regulations appropriate deference. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review). In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law. That is not the system Congress intended. Hence I believe that today's opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so.

# DAVIS *v.* WASHINGTON

## CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 05–5224. Argued March 20, 2006—Decided June 19, 2006*

In No. 05–5224, a 911 operator ascertained from Michelle McCottry that she had been assaulted by her former boyfriend, petitioner Davis, who had just fled the scene. McCottry did not testify at Davis's trial for felony violation of a domestic no-contact order, but the court admitted the 911 recording despite Davis's objection, which he based on the Sixth Amendment's Confrontation Clause. He was convicted. The Washington Court of Appeals affirmed, as did the State Supreme Court, which concluded that, *inter alia,* the portion of the 911 conversation in which McCottry identified Davis as her assailant was not testimonial.

In No. 05–5705, when police responded to a reported domestic disturbance at the home of Amy and Hershel Hammon, Amy told them that nothing was wrong, but gave them permission to enter. Once inside, one officer kept petitioner Hershel in the kitchen while the other interviewed Amy elsewhere and had her complete and sign a battery affidavit. Amy did not appear at Hershel's bench trial for, *inter alia,* domestic battery, but her affidavit and testimony from the officer who questioned her were admitted over Hershel's objection that he had no opportunity to cross-examine her. Hershel was convicted, and the Indiana Court of Appeals affirmed in relevant part. The State Supreme Court also affirmed, concluding that, although Amy's affidavit was testimonial and wrongly admitted, it was harmless beyond a reasonable doubt.

*Held:*

1. The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford* v. *Washington,* 541 U. S. 36, 53–54. These cases require the Court to determine which police "interrogations" produce statements that fall within this prohibition. Without attempting to produce an exhaustive classification of all conceivable statements as either testimonial or nontestimonial, it suffices to decide the present cases to hold that statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating

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*Together with No. 05–5705, *Hammon* v. *Indiana,* on certiorari to the Supreme Court of Indiana.

that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Pp. 821–822.

2. McCottry's statements identifying Davis as her assailant were not testimonial. Pp. 823–829.

(a) This case requires the Court to decide whether the Confrontation Clause applies only to testimonial hearsay, and, if so, whether the 911 recording qualifies. *Crawford* suggested the answer to the first question, noting that "the Confrontation Clause . . . applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" 541 U. S., at 51. Only "testimonial statements" cause a declarant to be a witness. The Court is unaware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not involve testimony as thus defined. Well into the 20th century, this Court's jurisprudence was carefully applied only in the testimonial context, and its later cases never in practice dispensed with the Confrontation Clause requirements of unavailability and prior cross-examination in cases involving testimonial hearsay. Pp. 823–826.

(b) The question in *Davis,* therefore, is whether, objectively considered, the interrogation during the 911 call produced testimonial statements. In contrast to *Crawford,* where the interrogation took place at a police station and was directed solely at establishing a past crime, a 911 call is ordinarily designed primarily to describe current circumstances requiring police assistance. The difference is apparent here. McCottry was speaking of events as they were actually happening, while Crawford's interrogation took place hours after the events occurred. Moreover, McCottry was facing an ongoing emergency. Further, the statements elicited were necessary to enable the police to resolve the present emergency rather than simply to learn what had happened in the past. Finally, the difference in the level of formality is striking. Crawford calmly answered questions at a station house, with an officer-interrogator taping and taking notes, while McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even safe. Thus, the circumstances of her interrogation objectively indicate that its primary purpose was to enable police assistance to meet an ongoing emergency. She was not acting as a witness or testifying. Pp. 826–829.

3. Amy Hammon's statements were testimonial. They were not much different from those in *Crawford.* It is clear from the circumstances that Amy's interrogation was part of an investigation into possi-

bly criminal past conduct. There was no emergency in progress, she told the police when they arrived that things were fine, and the officer questioning her was seeking to determine not what was happening but what had happened. Objectively viewed, the primary, if not sole, purpose of the interrogation was to investigate a possible crime. While the formal features of Crawford's interrogation strengthened her statements' testimonial aspect, such features were not essential to the point. In both cases, the declarants were separated from the defendants, the statements recounted how potentially criminal past events began and progressed, and the interrogation took place some time after the events were over. For the same reasons the comparison to *Crawford* is compelling, the comparison to *Davis* is unpersuasive. The statements in *Davis* were taken when McCottry was alone, unprotected by police, and apparently in immediate danger from Davis. She was seeking aid, not telling a story about the past. Pp. 829–832.

4. The Indiana courts may determine on remand whether a claim of forfeiture by wrongdoing—under which one who obtains a witness's absence by wrongdoing forfeits the constitutional right to confrontation—is properly raised in *Hammon*, and, if so, whether it is meritorious. Absent such a finding, the Sixth Amendment operates to exclude Amy Hammon's affidavit. Pp. 832–834.

No. 05–5224, 154 Wash. 2d 291, 111 P. 3d 844, affirmed; No. 05–5705, 829 N. E. 2d 444, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, SOUTER, GINSBURG, BREYER, and ALITO, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 834.

*Jeffrey L. Fisher*, by appointment of the Court, 546 U. S. 1074, argued the cause for petitioner in No. 05–5224. With him on the briefs was *Nancy Collins*. *Richard D. Friedman*, by appointment of the Court, 546 U. S. 1088, argued the cause for petitioner in No. 05–5705. With him on the briefs was *Kimberly A. Jackson*.

*James M. Whisman* argued the cause for respondent in No. 05–5224. With him on the brief were *Norm Maleng*, *Deborah A. Dwyer*, and *Lee D. Yates*. *Thomas M. Fisher*, Solicitor General of Indiana, argued the cause for respondent in No. 05–5705. With him on the brief were *Steve Carter*, Attorney General, and *Nicole M. Schuster* and *Julie A. Hoffman,* Deputy Attorneys General.

*Deputy Solicitor General Dreeben* argued the cause for the United States as *amicus curiae* urging affirmance in No. 05–5224. With him on the brief were *Solicitor General Clement, Assistant Attorney General Fisher, Irving L. Gornstein,* and *Joel M. Gershowitz.*

*Mr. Gornstein* argued the cause for the United States as *amicus curiae* urging affirmance in No. 05–5705. With him on the brief were *Solicitor General Clement, Assistant Attorney General Fisher,* and *Deputy Solicitor General Dreeben.*†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the American Civil Liberties Union et al. by *Jordan Gross, Steven R. Shapiro, Lenora Lapidus, Ken Falk,* and *Aaron Caplan;* and for the National Association of Criminal Defense Lawyers et al. by *Timothy P. O'Toole, Catharine F. Easterly, Andrea Roth, Corinne Beckwith, Pamela Harris,* and *Sheryl McCloud.*

Briefs of *amici curiae* urging affirmance in both cases were filed for the State of Illinois et al. by *Lisa Madigan,* Attorney General of Illinois, *Gary Feinerman,* Solicitor General, *Michael Scodro,* Deputy Solicitor General, and *Linda D. Woloshin* and *Anderson M. Gansner,* Assistant Attorneys General, by *Christopher L. Morano,* Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *Bill Lockyer* of California, *John W. Suthers* of Colorado, *Carl C. Danberg* of Delaware, *Charles J. Crist, Jr.,* of Florida, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Phill Kline* of Kansas, *J. Joseph Curran, Jr.,* of Maryland, *Thomas F. Reilly* of Massachusetts, *Michael A. Cox* of Michigan, *Jeremiah W. (Jay) Nixon* of Missouri, *Jon Bruning* of Nebraska, *George J. Chanos* of Nevada, *Patricia A. Madrid* of New Mexico, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Lawrence E. Long* of South Dakota, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William Sorrell* of Vermont, *Darrell V. McGraw, Jr.,* of West Virginia, and *Patrick J. Crank* of Wyoming; for Cook County, Illinois, by *Richard A. Devine* and *Veronica Calderon Malavia;* for the National Association of Counsel for Children by *Anthony J. Franze;* for the National District Attorneys Association by *Mark Ryan Dwyer, David M. Cohn, Susan Axelrod,* and *Joshua A. Engel;* and for the National Network to End Domestic Violence et al. by *Antonia B. Ianniello, Michael D. Rips, Jen-*

JUSTICE SCALIA delivered the opinion of the Court.

These cases require us to determine when statements made to law enforcement personnel during a 911 call or at a crime scene are "testimonial" and thus subject to the requirements of the Sixth Amendment's Confrontation Clause.

## I

### A

The relevant statements in *Davis* v. *Washington*, No. 05–5224, were made to a 911 emergency operator on February 1, 2001. When the operator answered the initial call, the connection terminated before anyone spoke. She reversed the call, and Michelle McCottry answered. In the ensuing conversation, the operator ascertained that McCottry was involved in a domestic disturbance with her former boyfriend Adrian Davis, the petitioner in this case:

> "911 Operator: Hello.
> "Complainant: Hello.
> "911 Operator: What's going on?
> "Complainant: He's here jumpin' on me again.
> "911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?
> "Complainant: I'm in a house.
> "911 Operator: Are there any weapons?
> "Complainant: No. He's usin' his fists.
> "911 Operator: Okay. Has he been drinking?
> "Complainant: No.
> "911 Operator: Okay, sweetie. I've got help started. Stay on the line with me, okay?
> "Complainant: I'm on the line.

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*nifer K. Brown*, *Lynn Hecht Schafran*, *Joan S. Meier*, and *Fernando R. Laguarda*.

*Kym L. Worthy* and *Timothy A. Baughman* filed a brief for Wayne County, Michigan, as *amicus curiae* urging affirmance in No. 05–5705.

> "911 Operator: Listen to me carefully. Do you know his last name?
> "Complainant: It's Davis.
> "911 Operator: Davis? Okay, what's his first name?
> "Complainant: Adran
> "911 Operator: What is it?
> "Complainant: Adrian.
> "911 Operator: Adrian?
> "Complainant: Yeah.
> "911 Operator: Okay. What's his middle initial?
> "Complainant: Martell. He's runnin' now." App. in No. 05–5224, pp. 8–9.

As the conversation continued, the operator learned that Davis had "just r[un] out the door" after hitting McCottry, and that he was leaving in a car with someone else. *Id.*, at 9–10. McCottry started talking, but the operator cut her off, saying, "Stop talking and answer my questions." *Id.*, at 10. She then gathered more information about Davis (including his birthday), and learned that Davis had told McCottry that his purpose in coming to the house was "to get his stuff," since McCottry was moving. *Id.*, at 11–12. McCottry described the context of the assault, *id.*, at 12, after which the operator told her that the police were on their way. "They're gonna check the area for him first," the operator said, "and then they're gonna come talk to you." *Id.*, at 12–13.

The police arrived within four minutes of the 911 call and observed McCottry's shaken state, the "fresh injuries on her forearm and her face," and her "frantic efforts to gather her belongings and her children so that they could leave the residence." 154 Wash. 2d 291, 296, 111 P. 3d 844, 847 (2005) (en banc).

The State charged Davis with felony violation of a domestic no-contact order. "The State's only witnesses were the two police officers who responded to the 911 call. Both officers testified that McCottry exhibited injuries that appeared to be recent, but neither officer could testify as to the cause of the injuries." *Ibid.* McCottry presumably could have testified as to whether Davis was her assailant, but she did not appear. Over Davis's objection, based on the Confrontation Clause of the Sixth Amendment, the trial court admitted the recording of her exchange with the 911 operator, and the jury convicted him. The Washington Court of Appeals affirmed, 116 Wash. App. 81, 64 P. 3d 661 (2003). The Supreme Court of Washington, with one dissenting justice, also affirmed, concluding that the portion of the 911 conversation in which McCottry identified Davis was not testimonial, and that if other portions of the conversation were testimonial, admitting them was harmless beyond a reasonable doubt. 154 Wash. 2d, at 305, 111 P. 3d, at 851. We granted certiorari. 546 U. S. 975 (2005).

### B

In *Hammon* v. *Indiana*, No. 05–5705, police responded late on the night of February 26, 2003, to a "reported domestic disturbance" at the home of Hershel and Amy Hammon. 829 N. E. 2d 444, 446 (Ind. 2005). They found Amy alone on the front porch, appearing "'somewhat frightened,'" but she told them that "'nothing was the matter,'" *id.*, at 446, 447. She gave them permission to enter the house, where an officer saw "a gas heating unit in the corner of the living room" that had "flames coming out of the . . . partial glass front. There were pieces of glass on the ground in front of it and there was flame emitting from the front of the heating unit." App. in No. 05–5705, p. 16.

Hershel, meanwhile, was in the kitchen. He told the police "that he and his wife had 'been in an argument' but 'everything was fine now' and the argument 'never became physical.'" 829 N. E. 2d, at 447. By this point Amy had come back inside. One of the officers remained with Hershel; the other went to the living room to talk with Amy, and "again asked [her] what had occurred." *Ibid.;* App. in No. 05–5705, at 17, 32. Hershel made several attempts to participate in Amy's conversation with the police, see *id.*, at 32, but was rebuffed. The officer later testified that Hershel "became angry when I insisted that [he] stay separated from Mrs. Hammon so that we can investigate what had happened." *Id.*, at 34. After hearing Amy's account, the officer "had her fill out and sign a battery affidavit." *Id.*, at 18. Amy handwrote the following: "Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter." *Id.*, at 2.

The State charged Hershel with domestic battery and with violating his probation. Amy was subpoenaed, but she did not appear at his subsequent bench trial. The State called the officer who had questioned Amy, and asked him to recount what Amy told him and to authenticate the affidavit. Hershel's counsel repeatedly objected to the admission of this evidence. See *id.*, at 11, 12, 13, 17, 19, 20, 21. At one point, after hearing the prosecutor defend the affidavit because it was made "under oath," defense counsel said, "That doesn't give us the opportunity to cross examine [the] person who allegedly drafted it. Makes me mad." *Id.*, at 19. Nonetheless, the trial court admitted the affidavit as a "present sense impression," *id.*, at 20, and Amy's statements as "excited utterances" that "are expressly permitted in these kinds of cases even if the declarant is not available to testify," *id.*, at 40. The officer thus testified that Amy

> "informed me that she and Hershel had been in an argument. That he became irrate [sic] over the fact of their daughter going to a boyfriend's house. The argument became . . . physical after being verbal and she informed me that Mr. Hammon, during the verbal part of the argument was breaking things in the living room and I believe she stated he broke the phone, broke the lamp, broke the front of the heater. When it became physical he threw her down into the glass of the heater.
>
> . . . . .

> "She informed me Mr. Hammon had pushed her onto the ground, had shoved her head into the broken glass of the heater and that he had punched her in the chest twice I believe." *Id.*, at 17–18.

The trial judge found Hershel guilty on both charges, *id.*, at 40, and the Indiana Court of Appeals affirmed in relevant part, 809 N. E. 2d 945 (2004). The Indiana Supreme Court also affirmed, concluding that Amy's statement was admissible for state-law purposes as an excited utterance, 829 N. E. 2d, at 449; that "a 'testimonial' statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings," where "the motivations of the questioner and declarant are the central concerns," *id.*, at 456, 457; and that Amy's oral statement was not "testimonial" under these standards, *id.*, at 458. It also concluded that, although the affidavit was testimonial and thus wrongly admitted, it was harmless beyond a reasonable doubt, largely because the trial was to the bench. *Id.*, at 458–459. We granted certiorari. 546 U. S. 975 (2005).

## II

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford* v. *Washington*, 541 U. S. 36, 53–54 (2004), we held that this provision bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." A critical portion of this holding, and the portion central to resolution of the two cases now before us, is the phrase "testimonial statements." Only statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause. See *id.*, at 51. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.

Our opinion in *Crawford* set forth "[v]arious formulations" of the core class of " 'testimonial' " statements, *ibid.*, but found it unnecessary to endorse any of them, because "some statements qualify under any definition," *id.*, at 52. Among those, we said, were "[s]tatements taken by police officers in the course of interrogations," *ibid.;* see also *id.*, at 53. The questioning that generated the deponent's statement in *Crawford*—which was made and recorded while she was in police custody, after having been given *Miranda* warnings as a possible suspect herself—"qualifies under any conceivable definition" of an " 'interrogation,' " 541 U. S., at 53, n. 4. We therefore did not define that term, except to say that "[w]e use [it] . . . in its colloquial, rather than any technical legal, sense," and that "one can imagine various definitions . . . , and we need not select among them in this case." *Ibid.* The character of the statements in the present cases is not as clear, and these cases require us to determine more precisely which police interrogations produce testimony.

Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[1]

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[1] Our holding refers to interrogations because, as explained below, the statements in the cases presently before us are the products of interrogations—which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers

## III

### A

In *Crawford*, it sufficed for resolution of the case before us to determine that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." *Id.*, at 53. Moreover, as we have just described, the facts of that case spared us the need to define what we meant by "interrogations." The *Davis* case today does not permit us this luxury of indecision. The inquiries of a police operator in the course of a 911 call[2] are an interrogation in one sense, but not in a sense that "qualifies under any conceivable definition." We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay; and, if so, whether the recording of a 911 call qualifies.

The answer to the first question was suggested in *Crawford*, even if not explicitly held:

> "The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to 'witnesses' against the accused—in other words, those who 'bear testimony.' 1 N. Webster, An American Dictionary of

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were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly *not* the result of sustained questioning. *Raleigh's Case,* 2 How. St. Tr. 1, 27 (1603).) And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.

[2] If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police. As in *Crawford* v. *Washington,* 541 U. S. 36 (2004), therefore, our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are "testimonial."

> the English Language (1828). 'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." 541 U. S., at 51.

A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its "core," but its perimeter.

We are not aware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not clearly involve testimony as thus defined.[3] Well into the 20th century, our own Confrontation Clause jurisprudence was carefully applied only in the testimonial context. See, *e. g., Reynolds* v. *United States,* 98 U. S. 145,

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[3] See, *e. g., State* v. *Webb,* 2 N. C. 103, 103–104 (Super. L. & Eq. 1794) *(per curiam)* (excluding deposition taken in absence of the accused); *State* v. *Atkins,* 1 Tenn. 229 (Super. L. & Eq. 1807) *(per curiam)* (excluding prior testimony of deceased witness); *Johnston* v. *State,* 10 Tenn. 58, 59 (Err. & App. 1821) (admitting written deposition of deceased deponent, because defendant had the opportunity to cross-examine); *Finn* v. *Commonwealth,* 26 Va. 701, 707–708 (1827) (excluding prior testimony of a witness still alive, though outside the jurisdiction); *State* v. *Hill,* 20 S. C. L. 607 (App. 1835) (excluding deposition of deceased victim taken in absence of the accused); *Commonwealth* v. *Richards,* 35 Mass. 434, 436–439 (1837) (excluding preliminary examination testimony of deceased witness because the witness's precise words were not available); *Bostick* v. *State,* 22 Tenn. 344 (1842) (admitting deposition of deceased where defendant declined opportunity to cross-examine); *People* v. *Newman,* 5 Hill 295 (N. Y. Sup. Ct. 1843) *(per curiam)* (excluding prior trial testimony of witness who was still alive); *State* v. *Campbell,* 30 S. C. L. 124, 125 (App. L. 1844) (excluding deposition taken in absence of the accused); *State* v. *Valentine,* 29 N. C. 225 (1847) *(per curiam)* (admitting preliminary examination testimony of decedent where defendant had opportunity to cross-examine); *Kendrick* v. *State,* 29 Tenn. 479, 491 (1850) (admitting testimony of deceased witness at defendant's prior trial); *State* v. *Houser,* 26 Mo. 431, 439–441 (1858) (excluding deposition of deponent who was still alive).

158 (1879) (testimony at prior trial was subject to the Confrontation Clause, but petitioner had forfeited that right by procuring witness's absence); *Mattox* v. *United States,* 156 U. S. 237, 240–244 (1895) (prior trial testimony of deceased witnesses admitted because subject to cross-examination); *Kirby* v. *United States,* 174 U. S. 47, 55–56 (1899) (guilty pleas and jury conviction of others could not be admitted to show that property defendant received from them was stolen); *Motes* v. *United States,* 178 U. S. 458, 467, 470–471 (1900) (written deposition subject to cross-examination was not admissible because witness was available); *Dowdell* v. *United States,* 221 U. S. 325, 330–331 (1911) (facts regarding conduct of prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to defendants' guilt or innocence and hence were not statements of "witnesses" under the Confrontation Clause).

Even our later cases, conforming to the reasoning of *Ohio* v. *Roberts,* 448 U. S. 56 (1980),[4] never in practice dispensed with the Confrontation Clause requirements of unavailability and prior cross-examination in cases that involved testimonial hearsay, see *Crawford,* 541 U. S., at 57–59 (citing cases), with one arguable exception, see *id.,* at 58, n. 8 (discussing *White* v. *Illinois,* 502 U. S. 346 (1992)). Where our cases did dispense with those requirements—even under the *Roberts* approach—the statements at issue were clearly nontestimonial. See, *e. g., Bourjaily* v. *United States,* 483 U. S. 171, 181–184 (1987) (statements made unwittingly to a Government informant); *Dutton* v. *Evans,* 400 U. S. 74, 87–89 (1970) (plurality opinion) (statements from one prisoner to another).

Most of the American cases applying the Confrontation Clause or its state constitutional or common-law counterparts involved testimonial statements of the most formal sort—sworn testimony in prior judicial proceedings or formal depositions under oath—which invites the argument that the scope of the Clause is limited to that very formal category. But the English cases that were the progenitors of the Confrontation Clause did not limit the exclusionary rule to prior court testimony and formal depositions, see *Crawford, supra,* at 52, and n. 3. In any event, we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case—English or early American, state or federal—can be cited, that is it.

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[4] "*Roberts* condition[ed] the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.'" *Crawford,* 541 U. S., at 60 (quoting *Roberts,* 448 U. S., at 66). We overruled *Roberts* in *Crawford* by restoring the unavailability and cross-examination requirements.

The question before us in *Davis,* then, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements. When we said in *Crawford, supra,* at 53, that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in *Crawford,* "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" 541 U. S., at 51. (The solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood. See, *e. g., United States* v. *Stewart,* 433 F. 3d 273, 288 (CA2 2006) (false statements made to federal investigators violate 18 U. S. C. § 1001); *State* v. *Reed,* 2005 WI 53,

¶ 30, 280 Wis. 2d 68, 85, 695 N. W. 2d 315, 323 (state criminal offense to "knowingly giv[e] false information to [an] officer with [the] intent to mislead the officer in the performance of his or her duty").) A 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establis[h] or prov[e]" some past fact, but to describe current circumstances requiring police assistance.

The difference between the interrogation in *Davis* and the one in *Crawford* is apparent on the face of things. In *Davis*, McCottry was speaking about events *as they were actually happening*, rather than "describ[ing] past events," *Lilly* v. *Virginia*, 527 U. S. 116, 137 (1999) (plurality opinion). Sylvia Crawford's interrogation, on the other hand, took place hours after the events she described had occurred. Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. Although one *might* call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against a bona fide physical threat. Third, the nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. See, *e. g., Hiibel* v. *Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U. S. 177, 186 (2004). And finally, the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

We conclude from all this that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness;* she was not *testifying.* What she said was not "a weaker substitute for live testimony" at trial, *United States* v. *Inadi,* 475 U. S. 387, 394 (1986), like Lord Cobham's statements in *Raleigh's Case,* 2 How. St. Tr. 1 (1603), or Jane Dingler's *ex parte* statements against her husband in *King* v. *Dingler,* 2 Leach 561, 168 Eng. Rep. 383 (1791), or Sylvia Crawford's statement in *Crawford.* In each of those cases, the *ex parte* actors and the evidentiary products of the *ex parte* communication aligned perfectly with their courtroom analogues. McCottry's emergency statement does not. No "witness" goes into court to proclaim an emergency and seek help.

Davis seeks to cast McCottry in the unlikely role of a witness by pointing to English cases. None of them involves statements made during an ongoing emergency. In *King* v. *Brasier,* 1 Leach 199, 168 Eng. Rep. 202 (1779), for example, a young rape victim, "immediately on her coming home, told all the circumstances of the injury" to her mother. *Id.,* at 200, 168 Eng. Rep., at 202. The case would be helpful to Davis if the relevant statement had been the girl's screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of past events.

This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, "evolve into testimonial statements," 829 N. E. 2d, at 457, once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford*, 541 U. S., at 53, n. 4. This presents no great problem. Just as, for Fifth Amendment purposes, "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect," *New York* v. *Quarles*, 467 U. S. 649, 658–659 (1984), trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through *in limine* procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence. Davis's jury did not hear the *complete* 911 call, although it may well have heard some testimonial portions. We were asked to classify only McCottry's early statements identifying Davis as her assailant, and we agree with the Washington Supreme Court that they were not testimonial. That court also concluded that, even if later parts of the call were testimonial, their admission was harmless beyond a reasonable doubt. Davis does not challenge that holding, and we therefore assume it to be correct.

### B

Determining the testimonial or nontestimonial character of the statements that were the product of the interrogation in *Hammon* is a much easier task, since they were not much different from the statements we found to be testimonial in *Crawford*. It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct—as, indeed, the testifying officer expressly acknowledged, App. in No. 05–5705, at 25, 32, 34. There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything, *id.*, at 25. When the officers first arrived, Amy told them that things were fine, *id.*, at 14, and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) "what is happening," but rather "what happened." Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime—which is, of course, precisely what the officer *should* have done.

It is true that the *Crawford* interrogation was more formal. It followed a *Miranda* warning, was tape-recorded, and took place at the station house, see 541 U. S., at 53, n. 4. While these features certainly strengthened the statements' testimonial aspect—made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events—none was essential to the point. It was formal enough that Amy's interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his "investigat[ion]." App. in No. 05–5705, at 34. What we called the "striking resemblance" of the *Crawford* statement to civil-law *ex parte* examinations, 541 U. S., at 52, is shared by Amy's statement here. Both declarants were actively separated from the defendant—officers forcibly prevented Hershel from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.[5]

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[5] The dissent criticizes our test for being "neither workable nor a targeted attempt to reach the abuses forbidden by the [Confrontation] Clause," *post,* at 842 (THOMAS, J., concurring in judgment in part and dissenting in part). As to the former: We have acknowledged that our hold-

Both Indiana and the United States as *amicus curiae* argue that this case should be resolved much like *Davis*. For the reasons we find the comparison to *Crawford* compelling, we find the comparison to *Davis* unpersuasive. The statements in *Davis* were taken when McCottry was alone, not only unprotected by police (as Amy Hammon was protected), but apparently in immediate danger from Davis. She was seeking aid, not telling a story about the past. McCottry's present-tense statements showed immediacy;

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ing is not an "exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation," *supra*, at 822, but rather a resolution of the cases before us and those like them. For *those* cases, the test is objective and quite "workable." The dissent, in attempting to formulate an exhaustive classification of its own, has not provided anything that deserves the description "workable"—unless one thinks that the distinction between "formal" and "informal" statements, see *post*, at 836–838, qualifies. And the dissent even qualifies that vague distinction by acknowledging that the Confrontation Clause "also reaches the use of technically informal statements when used to evade the formalized process," *post*, at 838, and cautioning that the Clause would stop the State from "us[ing] out-of-court statements as a means of circumventing the literal right of confrontation," *ibid.* It is hard to see this as much more "predictable," *ibid.*, than the rule we adopt for the narrow situations we address. (Indeed, under the dissent's approach it is eminently arguable that the dissent should agree, rather than disagree, with our disposition in *Hammon* v. *Indiana*, No. 05–5705.)

As for the charge that our holding is not a "targeted attempt to reach the abuses forbidden by the [Confrontation] Clause," *post*, at 842, which the dissent describes as the depositions taken by Marian magistrates, characterized by a high degree of formality, see *post*, at 835–836: We do not dispute that formality is indeed essential to testimonial utterance. But we no longer have examining Marian magistrates; and we do have, as our 18th-century forebears did not, examining police officers, see L. Friedman, Crime and Punishment in American History 67–68 (1993)—who perform investigative and testimonial functions once performed by examining Marian magistrates, see J. Langbein, The Origins of Adversary Criminal Trial 41 (2003). It imports sufficient formality, in our view, that lies to such officers are criminal offenses. Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction. Cf. *Kyllo* v. *United States*, 533 U. S. 27 (2001).

Amy's narrative of past events was delivered at some remove in time from the danger she described. And after Amy answered the officer's questions, he had her execute an affidavit, in order, he testified, "[t]o establish events that have occurred previously." App. in No. 05–5705, at 18.

Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial inquiries" at the crime scene will not be testimonial, see 829 N. E. 2d, at 453, 457, we do not hold the opposite—that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that "[o]fficers called to investigate . . . need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Hiibel,* 542 U. S., at 186. Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements. But in cases like this one, where Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were "initial inquiries" is immaterial. Cf. *Crawford, supra,* at 52, n. 3.[6]

## IV

Respondents in both cases, joined by a number of their *amici,* contend that the nature of the offenses charged in these two cases—domestic violence—requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free. Cf. *Kyllo* v. *United States,* 533 U. S. 27 (2001) (suppressing evidence from an illegal search). But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford:* that "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds." 541 U. S., at 62 (citing *Reynolds,* 98 U. S., at 158–159). That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

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[6] Police investigations themselves are, of course, in no way impugned by our characterization of their fruits as testimonial. Investigations of past crimes prevent future harms and lead to necessary arrests. While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so. The Confrontation Clause in no way governs police conduct, because it is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision. But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are.

We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard, see, *e. g., United States* v. *Scott,* 284 F. 3d 758, 762 (CA7 2002). State courts tend to follow the same practice, see, *e. g., Commonwealth* v. *Edwards,* 444 Mass. 526, 542, 830 N. E. 2d 158, 172 (2005). Moreover, if a hearing on forfeiture is required, *Edwards,* for instance, observed that "hearsay evidence, including the unavailable witness's out-of-court statements, may be considered." *Id.,* at 545, 830 N. E. 2d, at 174. The *Roberts* approach to the Confrontation Clause undoubtedly made recourse to this doctrine less necessary, because prosecutors could show the "reliability" of *ex parte* statements more easily than they could show the defendant's procurement of the witness's absence.

*Crawford,* in overruling *Roberts,* did not destroy the ability of courts to protect the integrity of their proceedings.

We have determined that, absent a finding of forfeiture by wrongdoing, the Sixth Amendment operates to exclude Amy Hammon's affidavit. The Indiana courts may (if they are asked) determine on remand whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious.

* * *

We affirm the judgment of the Supreme Court of Washington in No. 05–5224. We reverse the judgment of the Supreme Court of Indiana in No. 05–5705, and remand the case to that court for proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE THOMAS, concurring in the judgment in part and dissenting in part.

In *Crawford* v. *Washington,* 541 U. S. 36 (2004), we abandoned the general reliability inquiry we had long employed to judge the admissibility of hearsay evidence under the Confrontation Clause, describing that inquiry as "*inherently,* and therefore *permanently,* unpredictable." *Id.,* at 68, n. 10 (emphasis in original). Today, a mere two years after the Court decided *Crawford,* it adopts an equally unpredictable test, under which district courts are charged with divining the "primary purpose" of police interrogations. *Ante,* at 822. Besides being difficult for courts to apply, this test characterizes as "testimonial," and therefore inadmissible, evidence that bears little resemblance to what we have recognized as the evidence targeted by the Confrontation Clause. Because neither of the cases before the Court today would implicate the Confrontation Clause under an appropriately targeted standard, I concur only in the judgment in *Davis* v. *Washington,* No. 05–5224, and dissent from the Court's resolution of *Hammon* v. *Indiana,* No. 05–5705.

# I

## A

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U. S. Const., Amdt. 6. We have recognized that the operative phrase in the Clause, "witnesses against him," could be interpreted narrowly, to reach only those witnesses who actually testify at trial, or more broadly, to reach many or all of those whose out-of-court statements are offered at trial. *Crawford, supra,* at 42–43; *White* v. *Illinois,* 502 U. S. 346, 359–363 (1992) (THOMAS, J., concurring in part and concurring in judgment). Because the narrowest interpretation of the Clause would conflict with both the history giving rise to the adoption of the Clause and this Court's precedent, we have rejected such a reading. See *Crawford, supra,* at 50–51; *White, supra,* at 360 (opinion of THOMAS, J.).

Rejection of the narrowest view of the Clause does not, however, require the broadest application of the Clause to exclude otherwise admissible hearsay evidence. The history surrounding the right to confrontation supports the conclusion that it was developed to target particular practices that occurred under the English bail and committal statutes passed during the reign of Queen Mary, namely, the "civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford, supra,* at 43, 50; *White, supra,* at 361–362 (opinion of THOMAS, J.); *Mattox* v. *United States,* 156 U. S. 237, 242 (1895). "The predominant purpose of the [Marian committal] statute was to institute *systematic* questioning of the accused and the witnesses." J. Langbein, Prosecuting Crime in the Renaissance 23 (1974) (emphasis added). The statute required an oral examination of the suspect and the accusers, transcription within two days of the examinations, and physical transmission to the judges hearing the case.

*Id.*, at 10, 23. These examinations came to be used as evidence in some cases, in lieu of a personal appearance by the witness. *Crawford, supra,* at 43–44; 9 W. Holdsworth, A History of English Law 223–229 (1926). Many statements that would be inadmissible as a matter of hearsay law bear little resemblance to these evidentiary practices, which the Framers proposed the Confrontation Clause to prevent. See, *e. g., Crawford, supra,* at 51 (contrasting "[a]n off-hand, overheard remark" with the abuses targeted by the Confrontation Clause). Accordingly, it is unlikely that the Framers intended the word "witness" to be read so broadly as to include such statements. Cf. *Dutton* v. *Evans,* 400 U. S. 74, 94 (1970) (Harlan, J., concurring in result) (rejecting the "assumption that the core purpose of the Confrontation Clause of the Sixth Amendment is to prevent overly broad exceptions to the hearsay rule").

In *Crawford,* we recognized that this history could be squared with the language of the Clause, giving rise to a workable, and more accurate, interpretation of the Clause. " '[W]itnesses,' " we said, are those who " 'bear testimony.' " 541 U. S., at 51 (quoting 1 N. Webster, An American Dictionary of the English Language (1828)). And " '[t]estimony' " is " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " 541 U. S., at 51 (quoting Webster, *supra*). Admittedly, we did not set forth a detailed framework for addressing whether a statement is "testimonial" and thus subject to the Confrontation Clause. But the plain terms of the "testimony" definition we endorsed necessarily require some degree of solemnity before a statement can be deemed "testimonial."

This requirement of solemnity supports my view that the statements regulated by the Confrontation Clause must include "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *White, supra,* at 365 (opinion of THOMAS, J.). Affidavits, depositions, and prior testimony are, by their very nature, taken through a formalized process. Likewise, confessions, when extracted by police in a formal manner, carry sufficient indicia of solemnity to constitute formalized statements and, accordingly, bear a "striking resemblance," *Crawford, supra,* at 52, to the examinations of the accused and accusers under the Marian statutes.[1] See generally Langbein, *supra,* at 21–34.

Although the Court concedes that the early American cases invoking the right to confrontation or the Confrontation Clause itself all "clearly involve[d] testimony" as defined in *Crawford, ante,* at 824, it fails to acknowledge that all of the cases it cites fall within the narrower category of formalized testimonial materials I have proposed. See *ante,* at 824, n. 3.[2] Interactions between the police and an accused (or witnesses) resemble Marian proceedings—and these early cases—only when the interactions are somehow rendered "formal." In *Crawford,* for example, the interrogation was custodial, taken after warnings given pursuant to *Miranda* v. *Arizona,* 384 U. S. 436 (1966). 541 U. S., at 38. *Miranda* warnings, by their terms, inform a prospective defendant that "'anything he says can be used against him in a court of law.'" *Dickerson* v. *United States,* 530 U. S. 428, 435 (2000) (quoting *Miranda, supra,* at 479). This imports a solemnity to the process that is not present in a mere conversation between a witness or suspect and a police officer.[3]

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[1] Like the Court, I presume the acts of the 911 operator to be the acts of the police. *Ante,* at 823, n. 2. Accordingly, I refer to both the operator in *Davis* and the officer in *Hammon,* and their counterparts in similar cases, collectively as "the police."

[2] Our more recent cases, too, nearly all hold excludable under the Confrontation Clause materials that are plainly highly formal. See *White* v. *Illinois,* 502 U. S. 346, 365, n. 2 (1992) (THOMAS, J., concurring in part and concurring in judgment). The only exceptions involve confessions of codefendants to police, and those confessions appear to have either been formal due to their occurrence in custody or to have been formalized into signed documents. See *Douglas* v. *Alabama,* 380 U. S. 415, 416 (1965) (signed confession); *Brookhart* v. *Janis,* 384 U. S. 1 (1966) (signed confession taken after accomplice's arrest, see Brief for Petitioner in *Brookhart* v. *Janis,* O. T. 1965, No. 657, pp. 10–11); *Bruton* v. *United States,* 391 U. S. 123, 124 (1968) (custodial interrogation); *Roberts* v. *Russell,* 392 U. S. 293 (1968) *(per curiam)* (custodial interrogation following a warning that the codefendant's statement could be used against her at trial, see Brief in Opposition in *Roberts* v. *Russell,* O. T. 1967, No. 920, pp. 5–6).

The Court all but concedes that no case can be cited for its conclusion that the Confrontation Clause also applies to informal police questioning under certain circumstances. *Ante,* at 824–826. Instead, the sole basis for the Court's conclusion is its apprehension that the Confrontation Clause will "readily be evaded" if it is only applicable to formalized testimonial materials. *Ante,* at 826. But the Court's proposed solution to the risk of evasion is needlessly overinclusive. Because the Confrontation Clause sought to regulate prosecutorial abuse occurring through use of *ex parte* statements as evidence against the accused, it also reaches the use of technically informal statements when used to evade the formalized process. Cf. *ibid.* That is, even if the interrogation itself is not formal, the production of evidence by the prosecution at trial would resemble the abuses targeted by the Confrontation Clause if the prosecution attempted to use out-of-court statements as a means of circumventing the literal right of confrontation, see *Coy* v. *Iowa,* 487 U. S. 1012 (1988). In such a case, the Confrontation Clause could fairly be applied to exclude the hearsay statements offered by the prosecution, preventing evasion without simultaneously excluding evidence offered by the prosecution in good faith.

The Court's standard is not only disconnected from history and unnecessary to prevent abuse; it also yields no predictable results to police officers and prosecutors attempting to comply with the law. Cf. *Crawford, supra,* at 68, n. 10 (criticizing unpredictability of the pre-*Crawford* test); *White,* 502 U. S., at 364–365 (THOMAS, J., concurring in part and concurring in judgment) (limiting the Confrontation Clause to the discrete category of materials historically abused would "greatly simplify" application of the Clause). In many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence. See *New York* v. *Quarles,* 467 U. S. 649, 656 (1984) ("Undoubtedly most police officers [deciding whether to give *Miranda* warnings in a possible emergency situation] would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect"). Assigning one of these two "largely unverifiable motives," *ibid.,* primacy requires constructing a hierarchy of purpose that will rarely be present—and is not reliably discernible. It will inevitably be, quite simply, an exercise in fiction.

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[3] The possibility that an oral declaration of past fact to a police officer, if false, could result in legal consequences to the speaker, see *ante,* at 826–827, may render honesty in casual conversations with police officers important. It does not, however, render those conversations solemn or formal in the ordinary meanings of those terms.

The Court's repeated invocation of the word "objectiv[e]" to describe its test, see *ante,* at 822, 827, 828, 830, however, suggests that the Court may not mean to reference purpose at all, but instead to inquire into the function served by the interrogation. Certainly such a test would avoid the pitfalls that have led us repeatedly to reject tests dependent on the subjective intentions of police officers.[4] It would do so, however, at the cost of being even more disconnected from the prosecutorial abuses targeted by the Confrontation Clause. Additionally, it would shift the ability to control whether a violation occurred from the police and prosecutor to the judge, whose determination as to the "primary purpose" of a particular interrogation would be unpredictable and not necessarily tethered to the actual purpose for which the police performed the interrogation.

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[4] See *New York* v. *Quarles,* 467 U. S. 649, 655–656, and n. 6 (1984) (subjective motivation of officer not relevant in considering whether the public safety exception to *Miranda* v. *Arizona,* 384 U. S. 436 (1966), is applicable); *Rhode Island* v. *Innis,* 446 U. S. 291, 301 (1980) (subjective intent of police officer to obtain incriminatory statement not relevant to whether an interrogation has occurred); *Whren* v. *United States,* 517 U. S. 806, 813 (1996) (refusing to evaluate Fourth Amendment reasonableness in light of the officers' actual motivations).

## B

Neither the 911 call at issue in *Davis* nor the police questioning at issue in *Hammon* is testimonial under the appropriate framework. Neither the call nor the questioning is itself a formalized dialogue.[5] Nor do any circumstances surrounding the taking of the statements render those statements sufficiently formal to resemble the Marian examinations; the statements were neither Mirandized nor custodial, nor accompanied by any similar indicia of formality. Finally, there is no suggestion that the prosecution attempted to offer the women's hearsay evidence at trial in order to evade confrontation. See 829 N. E. 2d 444, 447 (Ind. 2005) (prosecution subpoenaed Amy Hammon to testify, but she was not present); 154 Wash. 2d 291, 296, 111 P. 3d 844, 847 (2005) (en banc) (State was unable to locate Michelle McCottry at the time of trial). Accordingly, the statements at issue in both cases are nontestimonial and admissible under the Confrontation Clause.

The Court's determination that the evidence against Hammon must be excluded extends the Confrontation Clause far beyond the abuses it was intended to prevent. When combined with the Court's holding that the evidence against Davis is perfectly admissible, however, the Court's *Hammon* holding also reveals the difficulty of applying the Court's requirement that courts investigate the "primary purpose[s]" of the investigation. The Court draws a line between the two cases based on its explanation that *Hammon* involves "no emergency in progress," but instead, mere questioning as "part of an investigation into possibly criminal past conduct," *ante*, at 829, and its explanation that *Davis* involves questioning for the "primary purpose" of "enabl[ing] police assistance to meet an ongoing emergency," *ante*, at 828. But the fact that the officer in *Hammon* was investigating Mr. Hammon's past conduct does not foreclose the possibility that the primary purpose of his inquiry was to assess whether Mr. Hammon constituted a continuing danger to his wife, requiring further police presence or action. It is hardly remarkable that Hammon did not act abusively toward his wife in the presence of the officers, *ante*, at 829–830, and his good judgment to refrain from criminal behavior in the presence of police sheds little, if any, light on whether his violence would have resumed had the police left without further questioning, transforming what the Court dismisses as "past conduct" back into an "ongoing emergency," *ante*, at 828, 829.[6] Nor does the mere fact that McCottry needed emergency aid shed light on whether the "primary purpose" of gathering, for example, the name of her assailant was to protect the police, to protect the victim, or to gather information for prosecution. In both of the cases before the Court, like many similar cases, pronouncement of the "primary" motive behind the interrogation calls for nothing more than a guess by courts.

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[5] Although the police questioning in *Hammon* was ultimately reduced to an affidavit, all agree that the affidavit is inadmissible *per se* under our definition of the term "testimonial." Brief for Respondent in No. 05–5705, p. 46; Brief for United States as *Amicus Curiae* in No. 05–5705, p. 14.

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[6] Some of the factors on which the Court relies to determine that the police questioning in *Hammon* was testimonial apply equally in *Davis*. For example, while Hammon was "actively separated from the [victim]" and thereby "prevented . . . from participating in the interrogation," Davis was apart from McCottry while she was questioned by the 911 operator and thus unable to participate in the questioning. *Ante*, at 818, 830. Similarly, "the events described [by McCottry] were over" by the time she recounted them to the 911 operator. *Ante*, at 830. See 154 Wash. 2d 291, 295–296, 111 P. 3d 844, 846–847 (2005) (en banc).

## II

Because the standard adopted by the Court today is neither workable nor a targeted attempt to reach the abuses forbidden by the Clause, I concur only in the judgment in *Davis* v. *Washington,* No. 05–5224, and respectfully dissent from the Court's resolution of *Hammon* v. *Indiana,* No. 05–5705.

# SAMSON *v.* CALIFORNIA

## CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 04–9728. Argued February 22, 2006—Decided June 19, 2006

Pursuant to a California statute—which requires every prisoner eligible for release on state parole to "agree in writing to be subject to search or seizure by a parole officer or other peace officer . . . , with or without a search warrant and with or without cause"—and based solely on petitioner's parolee status, an officer searched petitioner and found methamphetamine. The trial court denied his motions to suppress that evidence, and he was convicted of possession. Affirming, the State Court of Appeal held that suspicionless searches of parolees are lawful under California law and that the search in this case was reasonable under the Fourth Amendment because it was not arbitrary, capricious, or harassing.

*Held:* The Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee. Pp. 848–857.

(a) The "totality of the circumstances" must be examined to determine whether a search is reasonable under the Fourth Amendment. *United States* v. *Knights*, 534 U. S. 112, 118. Reasonableness "is determined by assessing, on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.*, at 118–119. Applying this approach in *Knights*, the Court found reasonable the warrantless search of a probationer's apartment based on reasonable suspicion and a probation condition authorized by California law. In evaluating the degree of intrusion into Knights' privacy, the Court found his probationary status "salient," *id.*, at 118, observing that probation is on a continuum of possible punishments and that probationers "do not enjoy 'the absolute liberty'" of other citizens, *id.*, at 119. It also found probation searches necessary to promote legitimate governmental interests of integrating probationers back into the community, combating recidivism, and protecting potential victims. Balancing those interests, the intrusion was reasonable. However, because the search was predicated on both the probation search condition and reasonable suspicion, the Court did not address the reasonableness of a search solely predicated upon the probation condition. Pp. 848–850.

(b) Parolees, who are on the "continuum" of state-imposed punishments, have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is. "The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Morrissey* v. *Brewer*, 408 U. S. 471, 477. California's system is consistent with these observations. An inmate electing to complete his sentence out of physical custody remains in the Department of Corrections' legal custody for the remainder of his term and must comply with the terms and conditions of his parole. The extent and reach of those conditions demonstrate that parolees have severely diminished privacy expectations by virtue of their status alone. Additionally, as in *Knights*, the state law's parole search condition was clearly expressed to petitioner, who signed an order submitting to the condition and thus was unambiguously aware of it. Examining the totality of the circumstances, petitioner did not have an expectation of privacy that society would recognize as legitimate. The State's interests, by contrast, are substantial. A State has an " 'overwhelming interest' " in supervising parolees because they "are more likely to commit future criminal offenses." *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 365. Similarly, a State's interests in reducing recidivism, thereby promoting reintegration and positive citizenship among probationers and parolees, warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment. The Amendment does not render States powerless to address these concerns effectively. California's 60- to 70-percent recidivism rate demonstrates that most parolees are ill prepared to handle the pressures of reintegration and require intense supervision. The State Legislature has concluded that, given the State's number of parolees and its high recidivism rate, an individualized suspicion requirement would undermine the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders. Contrary to petitioner's argument, the fact that some States and the Federal Government require a level of individualized suspicion before searching a parolee is of little relevance in determining whether California's system is drawn to meet the State's needs and is reasonable, taking into account a parolee's substantially diminished expectation of privacy. Nor is there merit to the argument that California's law grants discretion without procedural safeguards. The concern that the system gives officers unbridled discretion to conduct searches, thereby inflicting dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into society, is belied by the State's prohibition on arbitrary, capricious, or harassing searches. And petitioner's concern that the law frustrates reintegration efforts by permitting intrusions into the privacy interests of third persons is unavailing because that concern would arise under a suspicion-based system as well. Pp. 850–857.

Affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, GINSBURG, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER and BREYER, JJ., joined, *post*, p. 857.

*Robert A. Long* argued the cause for petitioner. With him on the briefs was *Martin Kassman.*

*Ronald E. Niver,* Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Bill Lockyer,* Attorney General, *Robert R. Anderson,* Chief Assistant Attorney General, *Manuel M. Medeiros,* State Solicitor General, *Donald E. De Nicola,* Deputy Solicitor General, *Gerald A. Engler,* Senior Assistant Attorney General, *Martin S. Kaye,* Supervising Deputy Attorney General, and *Doris A. Calandra,* Deputy Attorney General.

*Jonathan L. Marcus* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Clement, Assistant Attorney General Fisher, Deputy Solicitor General Dreeben,* and *Deborah Watson.**

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Graham A. Boyd, Steven R. Shapiro,* and *Alan Schlosser;* for the California Public Defenders Association et al. by *Michael C. McMahon* and *Kenneth I. Clayman;* for Citizens United for Rehabilitation of Errants by *Robert Weisberg;* and for the National Association of Criminal Defense Lawyers by *Carter G. Phillips, Jeffrey T. Green,* and *Pamela Harris.*

Briefs of *amici curiae* urging affirmance were filed for the State of Pennsylvania et al. by *Thomas W. Corbett, Jr.,* Attorney General of Pennsylvania, *Howard G. Hopkirk,* Senior Deputy Attorney General, and *John G. Knorr III,* Chief Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Mike Beebe* of Arkansas, *John W. Suthers* of Colorado, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Gregory D. Stumbo* of Kentucky, *J. Joseph Curran, Jr.,* of Maryland, *Michael A. Cox* of Michigan, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *George J. Chanos* of Nevada, *Wayne Stenehjem* of North Dakota, *Hardy Myers* of Oregon, *Lawrence E. Long* of South Dakota, *Paul G. Summers* of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Rob McKenna* of Washington, *Darrell V. McGraw, Jr.,* of West Virginia, and *Patrick J. Crank* of Wyo-

JUSTICE THOMAS delivered the opinion of the Court.

California law provides that every prisoner eligible for release on state parole "shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Cal. Penal Code Ann. § 3067(a) (West 2000). We granted certiorari to decide whether a suspicionless search, conducted under the authority of this statute, violates the Constitution. We hold that it does not.

## I

In September 2002, petitioner Donald Curtis Samson was on state parole in California, following a conviction for being a felon in possession of a firearm. On September 6, 2002, Officer Alex Rohleder of the San Bruno Police Department observed petitioner walking down a street with a woman and a child. Based on a prior contact with petitioner, Officer Rohleder was aware that petitioner was on parole and believed that he was facing an at-large warrant. Accordingly, Officer Rohleder stopped petitioner and asked him whether he had an outstanding parole warrant. Petitioner responded that there was no outstanding warrant and that he "was in good standing with his parole agent." Brief for Petitioner 4. Officer Rohleder confirmed, by radio dispatch, that petitioner was on parole and that he did not have an outstanding warrant. Nevertheless, pursuant to Cal. Penal Code Ann. § 3067(a) (West 2000) and based solely on petition-

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ming; for Americans for Effective Law Enforcement, Inc., et al. by *Wayne W. Schmidt, James P. Manak, Richard Weintraub,* and *Bernard J. Farber;* and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson.*

Briefs of *amici curiae* were filed for Los Angeles County by *Scott Wm. Davenport;* and for Los Angeles County District Attorney Steve Cooley by *Mr. Cooley, pro se, Lael R. Rubin, Brentford J. Ferreira,* and *Phyllis C. Asayama.*

er's status as a parolee, Officer Rohleder searched petitioner. During the search, Officer Rohleder found a cigarette box in petitioner's left breast pocket. Inside the box he found a plastic baggie containing methamphetamine.

The State charged petitioner with possession of methamphetamine pursuant to Cal. Health & Safety Code Ann. § 11377(a) (West 1991). The trial court denied petitioner's motion to suppress the methamphetamine evidence, finding that Cal. Penal Code Ann. § 3067(a) (West 2000) authorized the search and that the search was not "arbitrary or capricious." App. 62–63 (Proceedings on Motion to Supress). A jury convicted petitioner of the possession charge, and the trial court sentenced him to seven years' imprisonment.

The California Court of Appeal affirmed. Relying on *People* v. *Reyes*, 19 Cal. 4th 743, 968 P. 2d 445 (1998), the court held that suspicionless searches of parolees are lawful under California law; that "'[s]uch a search is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing'"; and that the search in this case was not arbitrary, capricious, or harassing. No. A102394 (Ct. App. Cal., 1st App. Dist., Oct. 14, 2004), App. 12–14.

We granted certiorari, 545 U. S. 1165 (2005), to answer a variation of the question this Court left open in *United States* v. *Knights*, 534 U. S. 112, 120, n. 6 (2001)—whether a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment.[1] Answering that question in the affirmative today, we affirm the judgment of the California Court of Appeal.

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[1] *Knights*, 534 U. S., at 120, n. 6 ("We do not decide whether the probation condition so diminished, or completely eliminated, Knights' reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment").

## II

"[U]nder our general Fourth Amendment approach" we "examin[e] the totality of the circumstances" to determine whether a search is reasonable within the meaning of the Fourth Amendment. *Id.*, at 118 (internal quotation marks omitted). Whether a search is reasonable "is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.*, at 118–119 (internal quotation marks omitted).

We recently applied this approach in *United States* v. *Knights*. In that case, California law required Knights, as a probationer, to "'[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer.'" *Id.*, at 114 (brackets in original). Several days after Knights had been placed on probation, police suspected that he had been involved in several incidents of arson and vandalism. Based upon that suspicion and pursuant to the search condition of his probation, a police officer conducted a warrantless search of Knights' apartment and found arson and drug paraphernalia. *Id.*, at 115–116.

We concluded that the search of Knights' apartment was reasonable. In evaluating the degree of intrusion into Knights' privacy, we found Knights' probationary status "salient," *id.*, at 118, observing that "[p]robation is 'one point . . . on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service,'" *id.*, at 119 (quoting *Griffin* v. *Wisconsin*, 483 U. S. 868, 874 (1987)). Cf. *Hudson* v. *Palmer*, 468 U. S. 517, 530 (1984) (holding that prisoners have no reasonable expectation of privacy). We further observed that, by virtue of their status alone, probationers "'do not enjoy "the absolute liberty to which every citizen is entitled,"'" *Knights, supra,* at 119 (quoting *Griffin, supra,* at 874, in turn quoting *Morrissey* v. *Brewer,* 408 U. S. 471, 480 (1972)), justifying the "impos[ition] [of] reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens," *Knights, supra,* at 119. We also considered the facts that Knights' probation order clearly set out the probation search condition, and that Knights was clearly informed of the condition. See 534 U. S., at 119. We concluded that under these circumstances, Knights' expectation of privacy was significantly diminished. See *id.,* at 119–120.

We also concluded that probation searches, such as the search of Knights' apartment, are necessary to the promotion of legitimate governmental interests. Noting the State's dual interest in integrating probationers back into the community and combating recidivism, see *id.,* at 120–121, we credited the "'assumption'" that, by virtue of his status, a probationer "'is more likely than the ordinary citizen to violate the law,'" *id.,* at 120 (quoting *Griffin, supra,* at 880). We further found that "probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be subject to supervision and face revocation of probation, and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply." *Knights,* 534 U. S., at 120. We explained that the State did not have to ignore the reality of recidivism or suppress its interests in "protecting potential victims of criminal enterprise" for fear of running afoul of the Fourth Amendment. *Id.,* at 121.

Balancing these interests, we held that "[w]hen an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." *Ibid.* Because the search at issue in *Knights* was predicated on both the probation search condition and reasonable suspicion, we did not reach the question whether the search would have been reasonable under the Fourth Amendment had it been solely predicated upon the condition of probation. *Id.*, at 120, n. 6. Our attention is directed to that question today, albeit in the context of a parolee search.

## III

As we noted in *Knights,* parolees are on the "continuum" of state-imposed punishments. *Id.*, at 119 (internal quotation marks omitted). On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment. As this Court has pointed out, "parole is an established variation on imprisonment of convicted criminals. . . . The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Morrissey, supra,* at 477. "In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements." *Pennsylvania Bd. of Probation and Parole* v. *Scott,* 524 U. S. 357, 365 (1998). See also *United States* v. *Reyes,* 283 F. 3d 446, 461 (CA2 2002) ("[F]ederal supervised release, . . . in contrast to probation, is meted out in addition to, not in lieu of, incarceration" (internal quotation marks omitted)); *United States* v. *Cardona,* 903 F. 2d 60, 63 (CA1 1990) ("[O]n the Court's continuum of possible punishments, parole is the stronger medicine; ergo, parolees enjoy even less of the average citizen's absolute liberty than do probationers" (citations and internal quotation marks omitted)).[2]

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[2] Contrary to the dissent's contention, nothing in our recognition that parolees are more akin to prisoners than probationers is inconsistent with our precedents. Nor, as the dissent suggests, do we equate parolees with prisoners for the purpose of concluding that parolees, like prisoners, have

California's system of parole is consistent with these observations: A California inmate may serve his parole period either in physical custody, or elect to complete his sentence out of physical custody and subject to certain conditions. Cal. Penal Code Ann. § 3060.5 (West 2000). Under the latter option, an inmate-turned-parolee remains in the legal custody of the California Department of Corrections through the remainder of his term, § 3056, and must comply with all of the terms and conditions of parole, including mandatory drug tests, restrictions on association with felons or gang members, and mandatory meetings with parole officers, Cal. Code Regs., tit. 15, § 2512 (2005); Cal. Penal Code Ann. § 3067 (West 2000). See also *Morrissey, supra,* at 478 (discussing other permissible terms and conditions of parole). General conditions of parole also require a parolee to report to his assigned parole officer immediately upon release, inform the parole officer within 72 hours of any change in employment status, request permission to travel a distance of more than 50 miles from the parolee's home, and refrain from criminal conduct and possession of firearms, specified weapons, or knives unrelated to employment. Cal. Code Regs., tit. 15,

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no Fourth Amendment rights. See *post,* at 861 (opinion of STEVENS, J.). That view misperceives our holding. If that were the basis of our holding, then this case would have been resolved solely under *Hudson* v. *Palmer,* 468 U. S. 517 (1984), and there would have been no cause to resort to Fourth Amendment analysis. See *ibid.* (holding traditional Fourth Amendment analysis of the totality of the circumstances inapplicable to the question whether a prisoner had a reasonable expectation of privacy in his prison cell). Nor is our rationale inconsistent with *Morrissey* v. *Brewer,* 408 U. S. 471, 482 (1972). In that case, the Court recognized that restrictions on a parolee's liberty are not unqualified. That statement, even if accepted as a truism, sheds no light on the extent to which a parolee's constitutional rights are indeed limited—and no one argues that a parolee's constitutional rights are not limited. *Morrissey* itself does not cast doubt on today's holding given that the liberty at issue in that case—the Fourteenth Amendment Due Process right to a hearing before revocation of parole—invokes wholly different analysis than the search at issue here.

§2512. Parolees may also be subject to special conditions, including psychiatric treatment programs, mandatory abstinence from alcohol, residence approval, and "[a]ny other condition deemed necessary by the Board [of Parole Hearings] or the Department [of Corrections and Rehabilitation] due to unusual circumstances." §2513. The extent and reach of these conditions clearly demonstrate that parolees like petitioner have severely diminished expectations of privacy by virtue of their status alone.

Additionally, as we found "salient" in *Knights* with respect to the probation search condition, the parole search condition under California law—requiring inmates who opt for parole to submit to suspicionless searches by a parole officer or other peace officer "at any time," Cal. Penal Code Ann. §3067(a) (West 2000)—was "clearly expressed" to petitioner. *Knights*, 534 U. S., at 119. He signed an order submitting to the condition and thus was "unambiguously" aware of it. *Ibid.* In *Knights*, we found that acceptance of a clear and unambiguous search condition "significantly diminished Knights' reasonable expectation of privacy." *Id.*, at 120. Examining the totality of the circumstances pertaining to petitioner's status as a parolee, "an established variation on imprisonment," *Morrissey*, 408 U. S., at 477, including the plain terms of the parole search condition, we conclude that petitioner did not have an expectation of privacy that society would recognize as legitimate.[3]

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[3] Because we find that the search at issue here is reasonable under our general Fourth Amendment approach, we need not reach the issue whether "acceptance of the search condition constituted consent in the *Schneckloth* [v. *Bustamonte*, 412 U. S. 218 (1973),] sense of a complete waiver of his Fourth Amendment rights." *United States* v. *Knights*, 534 U. S. 112, 118 (2001). The California Supreme Court has not yet construed Cal. Penal Code Ann. §3067 (West 2000), the statute which governs parole for crimes committed after 1996, and which imposes the consent requirement. The California Court of Appeal has, and it has concluded that, under §3067(b), "inmates who are otherwise eligible for parole yet refuse to agree to the mandatory search condition will remain imprisoned

The State's interests, by contrast, are substantial. This Court has repeatedly acknowledged that a State has an "'overwhelming interest'" in supervising parolees because "parolees. . . are more likely to commit future criminal offenses." *Pennsylvania Bd. of Probation and Parole*, 524 U. S., at 365 (explaining that the interest in combating recidivism "is the very premise behind the system of close parole supervision"). Similarly, this Court has repeatedly acknowledged that a State's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment. See *Griffin*, 483 U. S., at 879; *Knights, supra*, at 121.

The empirical evidence presented in this case clearly demonstrates the significance of these interests to the State of California. As of November 30, 2005, California had over 130,000 released parolees. California's parolee population has a 68- to 70-percent recidivism rate. See California Attorney General, Crime in California 37 (Apr. 2001) (explaining that 68 percent of adult parolees are returned to prison, 55 percent for a parole violation, 13 percent for the commission of a new felony offense); J. Petersilia, Challenges of Prisoner Reentry and Parole in California, 12 California Policy Research Center Brief, p. 2 (June 2000), available at http://

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. . . until either (1) the inmate agrees to the search condition and is otherwise eligible for parole, or (2) has lost all worktime credits and is eligible for release after having served the balance of his/her sentence." *People* v. *Middleton*, 131 Cal. App. 4th 732, 739–740, 31 Cal. Rptr. 3d 813, 818 (2005). Nonetheless, we decline to rest our holding today on the consent rationale. The California Supreme Court, we note, has not yet had a chance to address the question squarely, and it is far from clear that the State properly raised its consent theory in the courts below.

Nor do we address whether California's parole search condition is justified as a special need under *Griffin* v. *Wisconsin*, 483 U. S. 868 (1987), because our holding under general Fourth Amendment principles renders such an examination unnecessary.

www.ucop.edu/cprc/parole.pdf (as visited June 15, 2006, and available in Clerk of Court's case file) ("70% of the state's paroled felons reoffend within 18 months—the highest recidivism rate in the nation"). This Court has acknowledged the grave safety concerns that attend recidivism. See *Ewing* v. *California,* 538 U. S. 11, 26 (2003) (plurality opinion) ("Recidivism is a serious public safety concern in California and throughout the Nation").

As we made clear in *Knights,* the Fourth Amendment does not render the States powerless to address these concerns *effectively.* See 534 U. S., at 121. Contrary to petitioner's contention, California's ability to conduct suspicionless searches of parolees serves its interest in reducing recidivism, in a manner that aids, rather than hinders, the reintegration of parolees into productive society.

In California, an eligible inmate serving a determinate sentence may elect parole when the actual days he has served plus statutory time credits equal the term imposed by the trial court, Cal. Penal Code Ann. §§ 2931, 2933, 3000(b)(1) (West 2000), irrespective of whether the inmate is capable of integrating himself back into productive society. As the recidivism rate demonstrates, most parolees are ill prepared to handle the pressures of reintegration. Thus, most parolees require intense supervision. The California Legislature has concluded that, given the number of inmates the State paroles and its high recidivism rate, a requirement that searches be based on individualized suspicion would undermine the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders. This conclusion makes eminent sense. Imposing a reasonable suspicion requirement, as urged by petitioner, would give parolees greater opportunity to anticipate searches and conceal criminality. See *Knights, supra,* at 120; *Griffin,* 483 U. S., at 879. This Court concluded that the incentive-to-conceal concern justified an "intensive" system for supervising probationers in *Griffin, id.,* at 875. That concern applies with even greater force to a system of supervising parolees. See *United States* v. *Reyes,* 283 F. 3d, at 461 (observing that the *Griffin* rationale "appl[ies] *a fortiori*" to "federal supervised release, which, in contrast to probation, is 'meted out in addition to, not in lieu of, incarceration' "); *United States* v. *Crawford,* 372 F. 3d 1048, 1077 (CA9 2004) (Kleinfeld, J., concurring) (explaining that parolees, in contrast to probationers, "have been sentenced to prison for felonies and released before the end of their prison terms" and are "deemed to have acted more harmfully than anyone except those felons not released on parole"); *Hudson,* 468 U. S., at 529 (observing that it would be "naive" to institute a system of " 'planned random searches' " as that would allow prisoners to "anticipate" searches, thus defeating the purpose of random searches).

Petitioner observes that the majority of States and the Federal Government have been able to further similar interests in reducing recidivism and promoting reintegration, despite having systems that permit parolee searches based upon some level of suspicion. Thus, petitioner contends, California's system is constitutionally defective by comparison. Petitioner's reliance on the practices of jurisdictions other than California, however, is misplaced. That some States and the Federal Government require a level of individualized suspicion is of little relevance to our determination whether California's supervisory system is drawn to meet its needs and is reasonable, taking into account a parolee's substantially diminished expectation of privacy.[4]

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[4] The dissent argues that, "once one acknowledges that parolees do have legitimate expectations of privacy beyond those of prisoners, our Fourth Amendment jurisprudence does not permit the conclusion, reached by the Court here for the first time, that a search supported by neither individualized suspicion nor 'special needs' is nonetheless 'reasonable.' " *Post,* at 858. That simply is not the case. The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion. Thus, while this Court's jurisprudence has often recognized that "to accommodate public and private interests some quantum of individualized suspicion is

Nor is there merit to the argument that California's parole search law permits "a blanket grant of discretion untethered by any procedural safeguards," *post*, at 857 (STEVENS, J., dissenting). The concern that California's suspicionless search system gives officers unbridled discretion to conduct searches, thereby inflicting dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into productive society, is belied by California's prohibition on "arbitrary, capricious or harassing" searches. See *Reyes*, 19 Cal. 4th, at 752, 753–754, 968 P. 2d, at 450, 451; *People* v. *Bravo*, 43 Cal. 3d 600, 610, 738 P. 2d 336, 342 (1987) (probation); see also Cal. Penal Code Ann. § 3067(d) (West 2000) ("It is not the intent of the Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment").[5] The dissent's claim that parolees under California law are subject to capricious searches conducted at the unchecked "whim" of law enforcement officers, *post*, at 858–859, 860, ignores this prohibition. Likewise, petitioner's concern that California's suspicionless search law frustrates reintegration efforts by permitting intrusions into

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usually a prerequisite to a constitutional search or seizure," *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 560 (1976), we have also recognized that the "Fourth Amendment imposes no irreducible requirement of such suspicion," *id.*, at 561. Therefore, although this Court has only sanctioned suspicionless searches in limited circumstances, namely, programmatic and special needs searches, we have never held that these are the only limited circumstances in which searches absent individualized suspicion could be "reasonable" under the Fourth Amendment. In light of California's earnest concerns respecting recidivism, public safety, and reintegration of parolees into productive society, and because the object of the Fourth Amendment is *reasonableness*, our decision today is far from remarkable. Nor, given our prior precedents and caveats, is it "unprecedented." *Post*, at 857.

[5] Under California precedent, we note, an officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for the search is a parolee. See *People* v. *Sanders*, 31 Cal. 4th 318, 331–332, 73 P. 3d 496, 505–506 (2003); Brief for United States as *Amicus Curiae* 20.

the privacy interests of third parties is also unavailing because that concern would arise under a suspicion-based regime as well.

## IV

Thus, we conclude that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee. Accordingly, we affirm the judgment of the California Court of Appeal.

*It is so ordered.*

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE BREYER join, dissenting.

Our prior cases have consistently assumed that the Fourth Amendment provides some degree of protection for probationers and parolees. The protection is not as robust as that afforded to ordinary citizens; we have held that probationers' lowered expectation of privacy may justify their warrantless search upon reasonable suspicion of wrongdoing, see *United States* v. *Knights*, 534 U. S. 112 (2001). We have also recognized that the supervisory responsibilities of probation officers, who are required to provide "'individualized counseling'" and to monitor their charges' progress, *Griffin* v. *Wisconsin*, 483 U. S. 868, 876–877 (1987), and who are in a unique position to judge "how close a supervision the probationer requires," *id.*, at 876, may give rise to special needs justifying departures from Fourth Amendment strictures. See *ibid.* ("Although a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen"). But neither *Knights* nor *Griffin* supports a regime of suspicionless searches, conducted pursuant to a blanket grant of discretion untethered by any procedural safeguards, by law enforcement personnel who have no special interest in the welfare of the parolee or probationer.

What the Court sanctions today is an unprecedented curtailment of liberty. Combining faulty syllogism with circular reasoning, the Court concludes that parolees have no more legitimate an expectation of privacy in their persons than do prisoners. However superficially appealing that parity in treatment may seem, it runs roughshod over our precedent. It also rests on an intuition that fares poorly under scrutiny. And once one acknowledges that parolees do have legitimate expectations of privacy beyond those of prisoners, our Fourth Amendment jurisprudence does not permit the conclusion, reached by the Court here for the first time, that a search supported by neither individualized suspicion nor "special needs" is nonetheless "reasonable."

The suspicionless search is the very evil the Fourth Amendment was intended to stamp out. See *Boyd* v. *United States,* 116 U. S. 616, 625–630 (1886); see also, *e. g., Indianapolis* v. *Edmond,* 531 U. S. 32, 37 (2000). The pre-Revolutionary "writs of assistance," which permitted roving searches for contraband, were reviled precisely because they "placed 'the liberty of every man in the hands of every petty officer.'" *Boyd,* 116 U. S., at 625. While individualized suspicion "is not an 'irreducible' component of reasonableness" under the Fourth Amendment, *Edmond,* 531 U. S., at 37 (quoting *United States* v. *Martinez-Fuerte,* 428 U. S. 543, 561 (1976)), the requirement has been dispensed with only when programmatic searches were required to meet a "'special need' . . . divorced from the State's general interest in law enforcement," *Ferguson* v. *Charleston,* 532 U. S. 67, 79 (2001); see *Edmond,* 531 U. S., at 37; see also *Griffin,* 483 U. S., at 873 ("Although we usually require that a search be undertaken only pursuant to a warrant (and thus supported by probable cause, as the Constitution says warrants must be), . . . we have permitted exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable'").

Not surprisingly, the majority does not seek to justify the search of petitioner on "special needs" grounds. Although the Court has in the past relied on special needs to uphold warrantless searches of probationers, *id.*, at 873, 880, it has never gone so far as to hold that a probationer or parolee may be subjected to full search at the whim of any law enforcement officer he happens to encounter, whether or not the officer has reason to suspect him of wrongdoing. *Griffin,* after all, involved a search *by a probation officer* that was supported by *reasonable suspicion.* The special role of probation officers was critical to the analysis; "we deal with a situation," the Court explained, "in which there is an ongoing supervisory relationship—and one that is not, or at least not entirely, adversarial—between the object of the search and the decisionmaker." *Id.,* at 879. The State's interest or "special need," as articulated in *Griffin,* was an interest in supervising the wayward probationer's reintegration into society—not, or at least not principally, the general law enforcement goal of detecting crime, see *ante,* at 853.[1]

It is no accident, then, that when we later upheld the search of a probationer *by a law enforcement officer* (again, based on reasonable suspicion), we forwent any reliance on the special needs doctrine. See *Knights,* 534 U. S. 112. Even if the supervisory relationship between a probation officer and her charge may properly be characterized as one giving rise to needs "divorced from the State's general interest in law enforcement," *Ferguson,* 532 U. S., at 79; but see *id.,* at 79, n. 15, the relationship between an ordinary law enforcement officer and a probationer unknown to him may not. "None of our special needs precedents has sanctioned the routine inclusion of law enforcement, both in the design of the policy and in using arrests, either threatened or real, to implement the system designed for the special needs objectives." *Id.,* at 88 (KENNEDY, J., concurring in judgment).

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[1] As we observed in *Ferguson* v. *Charleston,* 532 U. S. 67 (2001), *Griffin*'s special needs rationale was cast into doubt by our later decision in *Skinner* v. *Railway Labor Executives' Assn.,* 489 U. S. 602 (1989), which reserved the question whether "'routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the . . . program,'" *Ferguson,* 532 U. S., at 79, n. 15 (quoting *Skinner,* 489 U. S., at 621, n. 5). But at least the State in *Griffin* could in good faith contend that its warrantless searches were supported by a special need conceptually distinct from law enforcement goals generally. Indeed, that a State's interest in supervising its parolees and probationers to ensure their smooth reintegration may occasionally diverge from its general law enforcement aims is illustrated by this very case. Petitioner's possession of a small amount of illegal drugs would not have been grounds for revocation of his parole. See Cal. Penal Code Ann. § 3063.1(a) (West Supp. 2006). Presumably, the California Legislature determined that it is unnecessary and perhaps even counterproductive, as a means of furthering the goals of the parole system, to reincarcerate former prisoners for simple possession. The general law enforcement interests the State espouses, by contrast, call for reincarceration.

Ignoring just how "closely guarded" is that "category of constitutionally permissible suspicionless searches," *Chandler* v. *Miller,* 520 U. S. 305, 309 (1997), the Court for the first time upholds an entirely suspicionless search unsupported by any special need. And it goes further: In special needs cases we have at least insisted upon programmatic safeguards designed to ensure evenhandedness in application; if individualized suspicion is to be jettisoned, it must be replaced with measures to protect against the state actor's unfettered discretion. See, *e. g., Delaware* v. *Prouse,* 440 U. S. 648, 654–655 (1979) (where a special need "precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field'" (quoting *Camara* v. *Municipal Court of City and County of San Francisco,* 387 U. S. 523, 532 (1967); footnote omitted)); *United States* v. *Brignoni-Ponce,* 422 U. S. 873, 882 (1975) ("[T]he reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government"). Here, by contrast, there are no policies in place—no "standards, guidelines, or procedures," *Prouse,* 440 U. S., at 650—to rein in officers and furnish a bulwark against the arbitrary exercise of discretion that is the height of unreasonableness.

The Court is able to make this unprecedented move only by making another. Coupling the dubious holding of *Hudson* v. *Palmer*, 468 U. S. 517 (1984), with the bald statement that "parolees have fewer expectations of privacy than probationers," *ante*, at 850, the Court two-steps its way through a faulty syllogism and, thus, avoids the application of Fourth Amendment principles altogether. The logic, apparently, is this: Prisoners have no legitimate expectation of privacy; parolees are like prisoners; therefore, parolees have no legitimate expectation of privacy. The conclusion is remarkable not least because we have long embraced its opposite.[2] It also rests on false premises. First, it is simply not true that a parolee's status, vis-à-vis either the State or the Constitution, is tantamount to that of a prisoner or even materially distinct from that of a probationer. See *Morrissey* v. *Brewer*, 408 U. S. 471, 482 (1972) ("Though the State properly subjects [a parolee] to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison"). A parolee, like a probationer, is set free in the world subject to restrictions intended to facilitate supervision and guard against antisocial behavior. As with probation, "the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements." *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 365 (1998). Certainly, parole differs from probation insofar as parole is "'meted out in addition to, not in lieu of, incarceration.'" *Ante*, at 850 (quoting *United States* v. *Reyes*, 283 F. 3d 446, 461 (CA2 2002)). And, certainly, parolees typically will have committed more serious crimes—ones warranting a prior term of imprisonment—than probationers. The latter distinction, perhaps, would support the conclusion that a State has a stronger interest in supervising parolees than it does in supervising probationers. But see *United States* v. *Williams*, 417 F. 3d 373, 376, n. 1 (CA3 2005) ("'[T]here is no constitutional difference between probation and parole for purposes of the [F]ourth [A]mendment'"). But why either distinction should result in refusal to acknowledge as legitimate, when harbored by parolees, the same expectation of privacy that probationers reasonably may harbor is beyond fathom.

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[2] See *Morrissey* v. *Brewer*, 408 U. S. 471, 482 (1972) ("[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty"); *Griffin* v. *Wisconsin*, 483 U. S. 868, 875 (1987) (the "degree of impingement upon [a probationer's] privacy . . . is not unlimited"); see also *Ferguson*, 532 U. S., at 101 (SCALIA, J., dissenting) ("I doubt whether Griffin's reasonable expectation of privacy in his home was any less than petitioners' reasonable expectation of privacy in their urine taken").

In any event, the notion that a parolee legitimately expects only so much privacy as a prisoner is utterly without foundation. *Hudson* v. *Palmer* does stand for the proposition that "[a] right of privacy in traditional Fourth Amendment terms" is denied individuals who are incarcerated. 468 U. S., at 527. But this is because it "is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities, . . . chief among which is internal security." *Id.*, at 524; see *id.*, at 538 (O'Connor, J., concurring) ("I agree that the government's compelling interest in prison safety, together with the necessarily ad hoc judgments required of prison officials, make prison cell searches and seizures appropriate for categorical treatment"[3]); see also *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 680 (1989) (SCALIA, J., dissenting). These "institutional needs"—safety of inmates and guards, "internal order," and sanitation, *Hudson*, 468 U. S., at 527–528—manifestly do not apply to parolees. As discussed above and in *Griffin*, *other* state interests may warrant certain intrusions into a parolee's privacy, but *Hudson*'s rationale cannot be mapped blindly onto the situation with which we are presented in this case.

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[3] Particularly in view of Justice O'Connor's concurrence, which emphasized the prison's programmatic interests in conducting suspicionless searches, see *Hudson*, 468 U. S., at 538, *Hudson* is probably best understood as a "special needs" case—not as standing for the blanket proposition that prisoners have no Fourth Amendment rights.

Nor is it enough, in deciding whether someone's expectation of privacy is "legitimate," to rely on the existence of the offending condition or the individual's notice thereof. Cf. *ante*, at 852. The Court's reasoning in this respect is entirely circular. The mere fact that a particular State refuses to acknowledge a parolee's privacy interest cannot mean that a parolee in that State has no expectation of privacy that society is willing to recognize as legitimate—especially when the measure that invades privacy is both the *subject* of the Fourth Amendment challenge and a clear outlier. With only one or two arguable exceptions, neither the Federal Government nor any other State subjects parolees to searches of the kind to which petitioner was subjected. And the fact of notice hardly cures the circularity; the loss of a subjective expectation of privacy would play "no meaningful role" in analyzing the legitimacy of expectations, for example, "if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry." *Smith* v. *Maryland*, 442 U. S. 735, 740–741, n. 5 (1979).[4]

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[4] Likewise, the State's argument that a California parolee "consents" to the suspicionless search condition is sophistry. Whether or not a prisoner can choose to remain in prison rather than be released on parole, cf. *ante*, at 852–853, n. 3, he has no "choice" concerning the search condition; he may either remain in prison, where he will be subjected to suspicionless searches, or he may exit prison and still be subject to suspicionless searches. Accordingly, "to speak of consent in this context is to resort to a 'manifest fiction,' for 'the [parolee] who purportedly waives his rights by accepting such a condition has little genuine option to refuse.'" 5 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 10.10(b), pp. 440–441 (4th ed. 2004).

Threaded through the Court's reasoning is the suggestion that deprivation of Fourth Amendment rights is part and parcel of any convict's punishment. See *ante*, at 848–850.[5] If a person may be subject to random and suspicionless searches in prison, the Court seems to assume, then he cannot complain when he is subject to the same invasion outside of prison, so long as the State still *can* imprison him. Punishment, though, is not the basis on which *Hudson* was decided. (Indeed, it is settled that a prison inmate "'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" *Turner* v. *Safley*, 482 U. S. 78, 95 (1987).) Nor, to my knowledge, have we ever sanctioned the use of any search as a punitive measure. Instead, the question in every case must be whether the balance of legitimate expectations of privacy, on the one hand, and the State's interests in conducting the relevant search, on the other, justifies dispensing with the warrant and probable-cause requirements that are otherwise dictated by the Fourth Amendment. That balance is not the same in prison as it is out. We held in *Knights*—without recourse to *Hudson*—that the balance favored allowing the State to conduct searches based on reasonable suspicion. Never before have we plunged below that floor absent a demonstration of "special needs."

Had the State imposed as a condition of parole a requirement that petitioner submit to random searches by his parole officer, who is "supposed to have in mind the welfare of the

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[5] This is a vestige of the long-discredited "act of grace" theory of parole. Compare *Escoe* v. *Zerbst*, 295 U. S. 490, 492–493 (1935) ("Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose"), with *Gagnon* v. *Scarpelli*, 411 U. S. 778, 782, n. 4 (1973) ("[A] probationer can no longer be denied due process, in reliance on the dictum in *Escoe* v. *Zerbst*, that probation is an 'act of grace'" (citation omitted)). See also *Morrissey*, 408 U. S., at 482.

[parolee]" and guide the parolee's transition back into society, *Griffin*, 483 U. S., at 876–877, the condition might have been justified either under the special needs doctrine or because at least part of the requisite "reasonable suspicion" is supplied in this context by the individual-specific knowledge gained through the supervisory relationship. See *id.*, at 879 (emphasizing probation office's ability to "assess probabilities in the light of its knowledge of [the probationer's] life, character, and circumstances"). Likewise, this might have been a different case had a court or parole board imposed the condition at issue based on specific knowledge of the individual's criminal history and projected likelihood of reoffending, or if the State had had in place programmatic safeguards to ensure evenhandedness. See *supra*, at 860. Under either of those scenarios, the State would at least have gone some way toward averting the greatest mischief wrought by officials' unfettered discretion. But the search condition here is imposed on *all* parolees—whatever the nature of their crimes, whatever their likelihood of recidivism, and whatever their supervisory needs—without any programmatic procedural protections.[6]

The Court seems to acknowledge that unreasonable searches "inflic[t] dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into productive society." *Ante*, at 856; see *Terry* v. *Ohio*, 392 U. S. 1, 19, 29 (1968). It is satisfied, however, that the

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[6] The Court devotes a good portion of its analysis to the recidivism rates among parolees in California. See *ante*, at 853–854. One might question whether those statistics, which postdate the California Supreme Court's decision to allow the purportedly recidivism-reducing suspicionless searches at issue here, actually demonstrate that the State's interest is being served by the searches. Cf. Reply Brief for Petitioner 10, and n. 10. Of course, one cannot deny that the interest itself is valid. That said, though, it has never been held sufficient to justify suspicionless searches. If high crime rates were grounds enough for disposing of Fourth Amendment protections, the Amendment long ago would have become a dead letter.

California courts' prohibition against "'arbitrary, capricious or harassing'" searches suffices to avert those harms—which are of course counterproductive to the State's purported aim of rehabilitating former prisoners and reintegrating them into society. See *ante*, at 856 (citing *People* v. *Reyes*, 19 Cal. 4th 743, 968 P. 2d 445 (1998)). I am unpersuaded. The requirement of individualized suspicion, in all its iterations, is the shield the Framers selected to guard against the evils of arbitrary action, caprice, and harassment. To say that those evils may be averted without that shield is, I fear, to pay lipservice to the end while withdrawing the means.[7]

Respectfully, I dissent.

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[7] As the Court observes, see *ante*, at 856, n. 5, under California law "an officer is entitled to conduct suspicionless searches only of persons known by him to be parolees." Brief for United States as *Amicus Curiae* 20 (citing *People* v. *Sanders*, 31 Cal. 4th 318, 331–332, 73 P. 3d 496, 505 (2003)). It would necessarily be arbitrary, capricious, and harassing to conduct a suspicionless search of someone without knowledge of the status that renders that person, in the State's judgment, susceptible to such an invasion.

# YOUNGBLOOD *v.* WEST VIRGINIA

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 05–6997. Decided June 19, 2006

Petitioner Youngblood was convicted of sexual assault and related charges based, *inter alia,* on the testimony of three young women that he and his friend held them captive and statements by one of the women that he sexually assaulted her. Youngblood later moved to set aside the verdict, claiming that a state trooper had suppressed an exculpatory note written by two of the women, which squarely contradicted the State's account of the incidents and directly supported Youngblood's consensual-sex defense. He argued that the suppression violated the State's federal constitutional obligation to disclose evidence favorable to the defense and referred to cases citing and applying *Brady* v. *Maryland,* 373 U. S. 83. The trial court denied Youngblood a new trial, saying that the note provided only impeachment, not exculpatory, evidence. The West Virginia Supreme Court of Appeals affirmed without examining the specific constitutional claims associated with the alleged suppression of favorable evidence.

*Held:* The case is remanded for the views of the full State Supreme Court on the *Brady* issue that Youngblood clearly presented. A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. See 373 U. S., at 87. *Brady* extends to impeachment evidence, *United States* v. *Bagley,* 473 U. S. 667, 676, and *Brady* suppression occurs even when the evidence not turned over is "known only to police investigators and not to the prosecutor," *Kyles* v. *Whitley,* 514 U. S. 419, 438. Reversal is required upon a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.,* at 435. Youngblood clearly presented a federal constitutional *Brady* claim to the State Supreme Court. If this Court is to reach the merits of the case, it would be better to have the benefit of that court's views on the *Brady* issue.

Certiorari granted; 217 W. Va. 535, 618 S. E. 2d 544, vacated and remanded.

PER CURIAM.

In April 2001, the State of West Virginia indicted petitioner Denver A. Youngblood, Jr., on charges including abduction of three young women, Katara, Kimberly, and Wendy, and two instances of sexual assault upon Katara. The cases went to trial in 2003 in the Circuit Court of Morgan County, where a jury convicted Youngblood of two counts of sexual assault, two counts of brandishing a firearm, and one count of indecent exposure. The conviction rested principally on the testimony of the three women that they were held captive by Youngblood and a friend of his, statements by Katara that she was forced at gunpoint to perform oral sex on Youngblood, and evidence consistent with a claim by Katara about disposal of certain physical evidence of their sexual encounter. Youngblood was sentenced to a combined term of 26 to 60 years' imprisonment, with 25 to 60 of those years directly attributable to the sexual-assault convictions.

Several months after being sentenced, Youngblood moved to set aside the verdict. He claimed that an investigator working on his case had uncovered new and exculpatory evidence, in the form of a graphically explicit note that both squarely contradicted the State's account of the incidents and directly supported Youngblood's consensual-sex defense. The note, apparently written by Kimberly and Wendy, taunted Youngblood and his friend for having been "played" for fools, warned them that the girls had vandalized the house where Youngblood brought them, and mockingly thanked Youngblood for performing oral sex on Katara. The note was said to have been shown to a state trooper investigating the sexual-assault allegations against Youngblood; the trooper allegedly read the note but declined to take possession of it, and told the person who produced it to destroy it. Youngblood argued that the suppression of this evidence violated the State's federal constitutional obligation to disclose evidence favorable to the defense, and in support of his argument he referred to cases citing and applying *Brady* v. *Maryland*, 373 U. S. 83 (1963).

The trial court denied Youngblood a new trial, saying that the note provided only impeachment, but not exculpatory, evidence. The trial court did not discuss *Brady* or its scope, but expressed the view that the investigating trooper had attached no importance to the note, and because he had failed to give it to the prosecutor the State could not now be faulted for failing to share it with Youngblood's counsel. See App. C to Pet. for Cert. (Tr. 22–23 (Sept. 25, 2003)).

A bare majority of the Supreme Court of Appeals of West Virginia affirmed, finding no abuse of discretion on the part of the trial court, but without examining the specific constitutional claims associated with the alleged suppression of favorable evidence. 217 W. Va. 535, 548, 618 S. E. 2d 544, 557 (2005) *(per curiam)*. Justice Davis, dissenting in an opinion that Justice Starcher joined, unambiguously characterized the trooper's instruction to discard the new evidence as a *Brady* violation. 217 W. Va., at 550–552, 618 S. E. 2d, at 559–561. The dissenters concluded that the note indicating that Youngblood engaged in consensual sex with Katara had been suppressed and was material, *id.*, at 550, n. 6, 618 S. E. 2d, at 559, n. 6 (citing *Kyles* v. *Whitley*, 514 U. S. 419, 435, 437–438 (1995)), both because it was at odds with the testimony provided by the State's three chief witnesses (Katara, Kimberly, and Wendy) and also because it was entirely consistent with Youngblood's defense at trial that his sexual encounters with Katara were consensual, 217 W. Va., at 551–552, 618 S. E. 2d, at 560–561. Youngblood then filed this petition for a writ of certiorari.

A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. See 373 U. S., at 87. This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence, *United States* v. *Bagley*, 473 U. S. 667, 676 (1985), and *Brady* suppression occurs when the government fails to turn over even evidence that is "known only to police investigators and not to the prosecutor," *Kyles*, 514 U. S., at 438. See *id.*, at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,'" *Strickler* v. *Greene*, 527 U. S. 263, 280 (1999) (quoting *Bagley*, *supra*, at 682 (opinion of Blackmun, J.)), although a "showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal," *Kyles*, 514 U. S., at 434. The reversal of a conviction is required upon a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.*, at 435.

Youngblood clearly presented a federal constitutional *Brady* claim to the State Supreme Court, see Brief for Appellant in No. 31765 (Sup. Ct. App. W. Va.), pp. 42–47, as he had to the trial court, see App. C to Pet. for Cert. (Tr. 6, 44–45, 50, 51 (Sept. 25, 2003)); *id.*, at 13, 17 (Sept. 29, 2003). And, as noted, the dissenting justices discerned the significance of the issue raised. If this Court is to reach the merits of this case, it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue. We, therefore, grant the petition for certiorari, vacate the judgment of the State Supreme Court, and remand the case for further proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

In *Lawrence* v. *Chater*, 516 U. S. 163 (1996) *(per curiam)*, we greatly expanded our "no-fault V & R practice" (GVR) beyond its traditional bounds. *Id.*, at 179 (SCALIA, J., dissenting). At the time, I remarked that "[t]he power to 'revise and correct' for error has become a power to void for suspicion" of error, *id.*, at 190 (quoting *Marbury* v. *Madison*, 1 Cranch 137, 175 (1803); alterations omitted). And I predicted that " 'GVR'd for clarification of —' " would "become a common form of order, drastically altering the role of this Court." 516 U. S., at 185. Today, by vacating the judgment of a state court simply because "[i]f this Court is to reach the merits of this case, it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue," *ante*, at 870, the Court brings this prediction to fulfillment.

In *Lawrence*, I identified three narrow circumstances in which this Court could, consistent with the traditional understanding of our appellate jurisdiction (or at least consistent with entrenched practice), justify vacating a lower court's judgment *without first identifying error*: "(1) where an intervening factor has arisen [*e. g.*, new legislation or a recent judgment of this Court] that has a legal bearing upon the decision, (2) where, in a context not governed by *Michigan* v. *Long*, 463 U. S. 1032 (1983), clarification of the opinion below is needed to assure our jurisdiction, and (3) (in acknowledgment of established practice, though not necessarily in agreement with its validity) where the respondent or appellee confesses error in the judgment below." 516 U. S., at 191–192 (dissenting opinion). Needless to say, today's novel GVR order falls into none of these categories. There has been no intervening change in law that might bear upon the judgment. Our jurisdiction is not in doubt, see *ante*, at 870; *State* v. *Frazier*, 162 W. Va. 935, 942, n. 5, 253 S. E. 2d 534, 538, n. 5 (1979) (petitioner's *Brady* claim was properly presented in his motion for a new trial). And the State has confessed no error—not even on the broadest and least supportable theory of what constitutes an error justifying vacatur. See, *e. g.*, *Alvarado* v. *United States*, 497 U. S. 543, 545

(1990) (Rehnquist, C. J., dissenting) (vacating when the Solicitor General confessed error in the lower court's " 'analysis,' " but not its judgment); *Stutson* v. *United States*, 516 U. S. 193 (1996) *(per curiam)* (vacating when the Solicitor General confessed error in a position taken before the Court of Appeals, on which the court *might* have relied; discussed in *Lawrence, supra*, at 184–185 (SCALIA, J., dissenting)); *Department of Interior* v. *South Dakota*, 519 U. S. 919, 921 (1996) (SCALIA, J., dissenting) (vacating when "the Government, having *lost* below, wishes to try out a new legal position"). Here, the Court vacates and remands *in light of nothing.*

Instead, the Court remarks tersely that it would be "better" to have "the benefit" of the West Virginia court's views on petitioner's *Brady* claim, should we eventually decide to take the case. *Ante*, at 870. The Court thus purports to conscript the judges of the Supreme Court of Appeals of West Virginia to write what is essentially an *amicus* brief on the merits of an issue they have already decided, in order to facilitate our *possible* review of the merits at some later time. It is not at all clear why it would be so much "better" to have the full court below address the *Brady* claim. True, we often prefer to review reasoned opinions that facilitate our consideration—though we *may* review even a summary disposition. See *Lawrence, supra*, at 186 (SCALIA, J., dissenting). But the dissenting judges in the case below discussed petitioner's *Brady* claim at some length (indeed, at greater length than appears in many of the decisions we agree to review), and argued that it was meritorious. See 217 W. Va. 535, 549–552, 618 S. E. 2d 544, 558–561 (2005) (Davis, J., joined by Starcher, J., dissenting). Since we sometimes review judgments with no opinion, and often review judgments with opinion only on one side of the issue, it is not clear why we need opinions on *both* sides here.

To tell the truth, there is only one obvious sense in which it might be "better" to have the West Virginia court revisit the *Brady* issue: If the majority suspects that the court below erred, there is a chance that the GVR-in-light-of-nothing will induce it to change its mind on remand, sparing us the trouble of correcting the suspected error. It is noteworthy that, to justify its GVR order, the Court does not invoke even the flabby standard adopted in *Lawrence*, namely, whether there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," 516 U. S., at 167. That is because (there being no relevant intervening event to create such a probability) the only *possibility* that the West Virginia court will alter its considered judgment *is created by this Court's GVR order itself.* A case such as this, which meets none of the usual, outcome-neutral criteria for granting certiorari set forth in this Court's Rules 10(a)–(c), could attract our notice only if we suspected that the judgment appealed from was in error. Those whose judgments we review have sometimes viewed even our legitimate, intervening-event GVR orders as polite directives that they reverse themselves. See, *e. g., Sharpe* v. *United States,* 712 F. 2d 65, 67 (CA4 1983) (Russell, J., dissenting) ("Once again, I think the majority has mistaken gentleness in instruction for indefiniteness in command. The Supreme Court was seeking to be gentle with us but there is, I submit, no mistaking what they expected us to do"). How much more is that suspicion justified when the GVR order rests on nothing more than our statement that it would be "better" for the lower court to reconsider its decision (much as a mob enforcer might suggest that it would be "better" to make protection payments).

Even when we suspect error, we may have many reasons not to grant certiorari outright in a case such as this—an overcrowded docket, a reluctance to correct "the misapplication of a properly stated rule of law," this Court's Rule 10, or (in this particular case) even a neo-Victorian desire to keep the lurid phrases of the "graphically explicit note," *ante,* at 868, out of the U. S. Reports. But none of these reasons justifies "a tutelary remand, as to a schoolboy made to do his homework again." *Lawrence,* 516 U. S., at 185–186 (SCALIA, J., dissenting). In "the nature of the appellate system created by the Constitution and laws of the United States," *id.,* at 178, state courts and lower federal courts are constitutionally distinct tribunals, independently authorized to decide issues of federal law. They are not, as we treat them today, "the creatures and agents of this body," *id.,* at 178–179. If we suspect that a lower court has erred and wish to correct its error, we should grant certiorari and decide the issue ourselves in accordance with the traditional exercise of our appellate jurisdiction.

It is particularly ironic that the Court inaugurates its "GVR-in-light-of-nothing" practice by vacating the judgment of a *state* court. Our no-fault GVR practice had its origins "in situations calling forth the special deference owed to state law and state courts in our system of federalism." *Id.,* at 179. We first used it to allow the state court to decide the effect of an intervening change in state law. *Ibid.* (citing *Missouri ex rel. Wabash R. Co.* v. *Public Serv. Comm'n,* 273 U. S. 126 (1927)). Likewise, our other legitimate category of no-fault GVR—to ensure our own jurisdiction—"originate[d] in the special needs of federalism." *Lawrence,* 516 U. S., at 181. In vacating the judgment of a state court for no better reason than our own convenience, we not only fail to observe, but positively flout the "special deference owed to . . . state courts," *id.,* at 179. Like the Ouroboros swallowing its tail, our GVR practice has ingested its own original justification.

Chief Justice Marshall wrote in *Marbury* v. *Madison* that "[i]t is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted . . . ." 1 Cranch, at 175. At best, today's unprecedented decision rests on a finding that the state court's "opinion, though arguably correct, [is] incomplete and unworkmanlike," *Lawrence*, 516 U. S., at 189 (SCALIA, J., dissenting)—which all Members of the Court in *Lawrence* agreed was an illegitimate basis for a GVR, see *id.*, at 173 *(per curiam)*. At worst, it is an implied threat to the lower court, not backed by a judgment of our own, that it had "better" reconsider its holding.

I suppose it would be available to the West Virginia Supreme Court of Appeals, on remand, simply to reaffirm its judgment without further elaboration. Or it could instead enter into a full discussion of the *Brady* issue, producing either a reaffirmance or a revision of its judgment. The latter course will of course encourage and stimulate our new "GVR-in-light-of-nothing" jurisprudence. *Verb. sap.*

For these reasons, I respectfully dissent.

JUSTICE KENNEDY, dissenting.

The Court's order to grant, vacate, and remand (GVR) in *Lawrence* v. *Chater*, 516 U. S. 163 (1996) *(per curiam)*, had my assent. In that case there was a new administrative interpretation that the Court of Appeals did not have an opportunity to consider. *Id.*, at 174. The Court today extends the GVR procedure well beyond *Lawrence* and the traditional practice of issuing a GVR order in light of some new development. See *id.*, at 166–167. Since the issuance of a GVR order simply for further explanation is, as JUSTICE SCALIA explains, see *ante*, p. 870 (dissenting opinion), both improper and contrary to our precedents, I respectfully dissent.

## REPORTER'S NOTE

The next page is purposely numbered 1001. The numbers between 875 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

# ORDERS FOR MARCH 6 THROUGH JUNE 20, 2006

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March 6, 2006

*Certiorari Dismissed*

No. 05–8566. Nimmons *v.* Crist et al.; and Nimmons *v.* McDonough, Interim Secretary, Florida Department of Corrections. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 05–9111. James *v.* United States District Court for the Middle District of Florida. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals,* 506 U. S. 1 (1992) *(per curiam).* Justice Stevens dissents. See *id.,* at 4, and cases cited therein.

No. 05–9113. Fleming *v.* Adams, Warden. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 138 Fed. Appx. 527.

*Miscellaneous Orders*

No. 05M64. Buckley *v.* Powell, Warden; and
No. 05M65. Nichols *v.* Washington Hospital Center et al. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 04–1739. Beard, Secretary, Pennsylvania Department of Corrections *v.* Banks, Individually and on Behalf of All Others Similarly Situated. C. A. 3d Cir. [Certiorari granted, 546 U. S. 1015.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE ALITO took no part in the consideration or decision of this motion.

No. 05–7053. DIXON *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 546 U. S. 1135.] Motion of petitioner for appointment of counsel granted. J. Craig Jett, Esq., of Dallas, Tex., is appointed to serve as counsel for petitioner in this case.

No. 05–9173. IN RE DILLON; and
No. 05–9201. IN RE PERKINS. Petitions for writs of habeas corpus denied.

No. 05–8429. IN RE SCOTT; and
No. 05–9058. IN RE GRIFFITH. Petitions for writs of mandamus denied.

No. 05–9050. IN RE HUNDLEY. Petition for writ of mandamus and/or prohibition denied.

*Certiorari Granted*

No. 05–7058. JONES *v.* BOCK, WARDEN, ET AL.; and
No. 05–7142. WILLIAMS *v.* OVERTON ET AL.; and WALTON *v.* BOUCHARD ET AL. C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: No. 05–7058, 135 Fed. Appx. 837; No. 05–7142, 136 Fed. Appx. 846 (second judgment) and 859 (first judgment).

*Certiorari Denied*

No. 04–1501. INDEPENDENT INK, INC. *v.* ILLINOIS TOOL WORKS INC. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 396 F. 3d 1342.

No. 05–596. PEREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 414 F. 3d 302 and 138 Fed. Appx. 379.

No. 05–666. SEINFELD *v.* GRAY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 404 F. 3d 645.

No. 05–677. GOSSELIN WORLD WIDE MOVING, N. V., ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 411 F. 3d 502.

No. 05–682. McMullen et ux. *v.* Medtronic, Inc. C. A. 7th Cir. Certiorari denied. Reported below: 421 F. 3d 482.

No. 05–690. HSBC Bank USA et al. *v.* United Air Lines, Inc. C. A. 7th Cir. Certiorari denied. Reported below: 416 F. 3d 609.

No. 05–711. Greene, Executrix of the Estate of Greene, Deceased *v.* B. F. Goodrich Avionics Systems, Inc. C. A. 6th Cir. Certiorari denied. Reported below: 409 F. 3d 784.

No. 05–818. Grover et al. *v.* Northwest Steelheaders Assn., Inc., et al. Ct. App. Ore. Certiorari denied. Reported below: 199 Ore. App. 471, 112 P. 3d 383.

No. 05–825. New Process Steel, LP *v.* Young et al. C. A. 11th Cir. Certiorari denied. Reported below: 419 F. 3d 1201.

No. 05–831. Sadlowski et ux. *v.* Benoit. C. A. 1st Cir. Certiorari denied.

No. 05–834. Williams *v.* Lozosky, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 3d 1006.

No. 05–836. PHL, Inc., et al. *v.* Pullman Bank & Trust Co. et al. Sup. Ct. Ill. Certiorari denied. Reported below: 216 Ill. 2d 250, 836 N. E. 2d 351.

No. 05–837. O'Connor et al. *v.* Washburn University et al. C. A. 10th Cir. Certiorari denied. Reported below: 416 F. 3d 1216.

No. 05–838. Murray et al. *v.* Colorado et al. C. A. 10th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 772.

No. 05–839. Proffitt *v.* Metropolitan Government of Nashville and Davidson County, Tennessee. C. A. 6th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 439.

No. 05–842. Avery et al. *v.* State Farm Mutual Automobile Insurance Co. Sup. Ct. Ill. Certiorari denied. Reported below: 216 Ill. 2d 100, 835 N. E. 2d 801.

No. 05–844. Brumfield *v.* Brumfield. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 355 Ill. App. 3d 1203, 885 N. E. 2d 586.

No. 05–845. Blair *v.* Wills et al. C. A. 8th Cir. Certiorari denied. Reported below: 420 F. 3d 823.

No. 05–846. BJY, Inc., et al. *v.* El-Hakem. C. A. 9th Cir. Certiorari denied. Reported below: 415 F. 3d 1068.

No. 05–865. Pacific Rock Corp. *v.* Perez, Director of Administration, Government of Guam. Sup. Ct. Guam. Certiorari denied. Reported below: 2004 Guam 1.

No. 05–871. Collier *v.* Harrold et ux. Sup. Ct. Ohio. Certiorari denied. Reported below: 107 Ohio St. 3d 44, 836 N. E. 2d 1165.

No. 05–872. Thomas *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 05–873. Chun Wang *v.* Department of Justice et al. C. A. 2d Cir. Certiorari denied. Reported below: 140 Fed. Appx. 312.

No. 05–898. Bettis *v.* Kelly, Commissioner, New York City Police Department, et al. C. A. 2d Cir. Certiorari denied. Reported below: 137 Fed. Appx. 381.

No. 05–938. Wernsing et al. *v.* Thompson. C. A. 7th Cir. Certiorari denied. Reported below: 423 F. 3d 732.

No. 05–939. Hoagland et ux. *v.* Town of Clear Lake, Indiana, et al. C. A. 7th Cir. Certiorari denied. Reported below: 415 F. 3d 693.

No. 05–949. Bryant *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 148.

No. 05–955. Krilich *v.* Winn. C. A. 1st Cir. Certiorari denied.

No. 05–968. Soderstrand *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 412 F. 3d 1146.

No. 05–975. Brush *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 05–984. Brown *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 143 Fed. Appx. 628.

No. 05–7013. Tirouda et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 394 F. 3d 683.

No. 05–7134. Crenshaw *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 140 Fed. Appx. 836.

No. 05–7266. Thompson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 421 F. 3d 278.

No. 05–7297. Becerra-Garcia *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 397 F. 3d 1167.

No. 05–7410. Palmer *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 417 F. 3d 741.

No. 05–7445. Alexander *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 143 Fed. Appx. 340.

No. 05–7892. Hardridge *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 746.

No. 05–7942. Green *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 05–7966. Wingate *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 415 F. 3d 885.

No. 05–7991. Strobehn *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 421 F. 3d 1017.

No. 05–8327. Emery *v.* Chanos, Attorney General of Nevada. C. A. 9th Cir. Certiorari denied. Reported below: 139 Fed. Appx. 817.

No. 05–8329. Kou Lo Vang *v.* Nevada et al. C. A. 9th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 151.

No. 05–8334. Mills *v.* Kentucky. Sup. Ct. Ky. Certiorari denied. Reported below: 170 S. W. 3d 310.

No. 05–8335. Partin *v.* Kentucky. Sup. Ct. Ky. Certiorari denied. Reported below: 168 S. W. 3d 23.

No. 05–8344. Allen *v.* Hines, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 144 Fed. Appx. 744.

No. 05–8345. Brown *v.* Cathel, Administrator, New Jersey State Prison, et al. C. A. 3d Cir. Certiorari denied.

No. 05–8346. Burnside *v.* Davis et al. C. A. 11th Cir. Certiorari denied.

No. 05–8349. Alexander *v.* Marsh & McLennan, Inc., et al. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 354 Ill. App. 3d 1154, 883 N. E. 2d 1146.

No. 05–8354. Madrid Salazar *v.* Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 419 F. 3d 384.

No. 05–8371. Blair *v.* Washington. Ct. App. Wash. Certiorari denied.

No. 05–8374. Birks *v.* Galaza, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 139 Fed. Appx. 820.

No. 05–8376. Perry *v.* Johnson, Commissioner, New York State Office of Children and Family Services, et al. C. A. 2d Cir. Certiorari denied. Reported below: 150 Fed. Appx. 22.

No. 05–8384. Glaude *v.* Brazelton et al. C. A. 9th Cir. Certiorari denied.

No. 05–8387. Turnpaugh *v.* Michigan. Sup. Ct. Mich. Certiorari denied. Reported below: 474 Mich. 937, 706 N. W. 2d 26.

No. 05–8396. Edwards *v.* Evans, Acting Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 515.

No. 05–8417. Perry *v.* McQuiggin. C. A. 6th Cir. Certiorari denied.

No. 05–8421. Jones *v.* Michigan. C. A. 6th Cir. Certiorari denied.

No. 05–8423. Sabbia *v.* Lombardi. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 355 Ill. App. 3d 1189, 885 N. E. 2d 581.

No. 05–8426. Martello *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied.

No. 05–8438. SCOTT *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 05–8440. SAVAGE *v.* VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 640.

No. 05–8442. ROSS *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 05–8444. SANTIAGO *v.* LANTZ, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. App. Ct. Conn. Certiorari denied. Reported below: 90 Conn. App. 420, 876 A. 2d 1277.

No. 05–8445. SAINT-FLEUR *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied.

No. 05–8450. ALLGOOD *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 355 Ill. App. 3d 1194, 885 N. E. 2d 583.

No. 05–8453. WALKER *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY. Sup. Ct. Cal. Certiorari denied.

No. 05–8454. THOMAS *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–8457. VANDERWALL *v.* CITY OF VIRGINIA BEACH, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 137 Fed. Appx. 592.

No. 05–8462. WHEELER *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 355 Ill. App. 3d 1207, 885 N. E. 2d 588.

No. 05–8464. THOMAS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 139 Fed. Appx. 620.

No. 05–8467. MILLS *v.* HELLING, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 05–8470. ANDERSON *v.* DONALD, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS. Super. Ct. Coffee County, Ga. Certiorari denied.

No. 05–8471. BARTLETT *v.* NORTH CAROLINA DEPARTMENT OF CORRECTION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 140 Fed. Appx. 505.

No. 05–8479. Cooke *v.* Kane, Warden. C. A. 9th Cir. Certiorari denied.

No. 05–8480. Claiborne *v.* Holland et al. C. A. 9th Cir. Certiorari denied.

No. 05–8496. Diaz *v.* Conway, Superintendent, Attica Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 05–8514. Butler *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 917 So. 2d 192.

No. 05–8517. Bouie *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 911 So. 2d 1236.

No. 05–8574. Rosales *v.* Woodford, Acting Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 626.

No. 05–8617. Wilson *v.* Evans, Acting Warden. C. A. 9th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 719.

No. 05–8629. Chambers *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 05–8695. Villa-Cardenas *v.* Vare, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 537.

No. 05–8703. Montgomery *v.* Uchtman, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 426 F. 3d 905.

No. 05–8724. Alexander *v.* Belleque, Superintendent, Oregon State Penitentiary. C. A. 9th Cir. Certiorari denied. Reported below: 152 Fed. Appx. 578.

No. 05–8799. Pratt *v.* Conway, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 582.

No. 05–8841. Townsend *v.* Virginia. Sup. Ct. Va. Certiorari denied. Reported below: 270 Va. 325, 619 S. E. 2d 71.

No. 05–8853. Smith *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 424 F. 3d 992.

No. 05–8886. Boroughs *v.* Cotton, Superintendent, Pendleton Correctional Facility. C. A. 7th Cir. Certiorari denied.

No. 05–9000. Hemric *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 152 Fed. Appx. 316.

No. 05–9001. Hammons *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 492.

No. 05–9002. Gomez-Benabe *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 05–9003. Harris *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 882.

No. 05–9005. Flute *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 363 F. 3d 676.

No. 05–9010. Shivers *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–9011. Rayford *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 05–9013. Mendez *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–9014. Myers *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 147 Fed. Appx. 413.

No. 05–9016. Kurt *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 143 Fed. Appx. 848.

No. 05–9018. Chauncey *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 420 F. 3d 864.

No. 05–9021. Eckles *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 142 Fed. Appx. 190.

No. 05–9022. Lennon *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 383.

No. 05–9024. King *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 05–9027. Ramirez *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 148 Fed. Appx. 721.

No. 05–9030. Sumrell *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 05–9033. BEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 152 Fed. Appx. 414.

No. 05–9036. BARNES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 232.

No. 05–9039. ROBINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–9051. CLEVELAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 266.

No. 05–9053. CALZADA-VILLA *v.* UNITED STATES; CRUZ-HERNANDEZ, AKA HERNANDEZ *v.* UNITED STATES; ELIAS, AKA ELIAS-ELIAS *v.* UNITED STATES; ESPINOZA-DE LA CRUZ *v.* UNITED STATES; GARCIA-CASTANEDA *v.* UNITED STATES; HERNANDEZ-GONZALEZ *v.* UNITED STATES; ALVARADO-ESCARCEGA, AKA ESCARCEGA *v.* UNITED STATES; and CARRERA-MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 147 Fed. Appx. 416 (third judgment), 421 (seventh judgment), and 427 (fifth judgment); 148 Fed. Appx. 236 (eighth judgment); 153 Fed. Appx. 276 (first judgment), 315 (second judgment), 322 (fourth judgment), and 940 (sixth judgment).

No. 05–9054. BRESETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–9055. GORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 05–9059. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 132 Fed. Appx. 821.

No. 05–9061. PATRICK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 127 Fed. Appx. 470.

No. 05–9062. ROOKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 152 Fed. Appx. 323.

No. 05–9063. SANTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 475.

No. 05–9064. RADFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 05–9066. DIAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 05–9067. Pleitez-Martinez *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 05–9070. Langford *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 936.

No. 05–9076. Contreras *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 278.

No. 05–9080. Pugh *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 05–9081. Curtis *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 05–9082. Dupas *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 419 F. 3d 916.

No. 05–9083. Cobbs *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 430.

No. 05–9084. Alexander *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 148 Fed. Appx. 241.

No. 05–9087. Artiaga *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 152 Fed. Appx. 636.

No. 05–9089. Barton *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 05–9090. Atayde *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 726.

No. 05–9091. Adams *v.* Davis, Warden. C. A. 7th Cir. Certiorari denied.

No. 05–9095. Bost *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 05–9096. Gartrell *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 879 A. 2d 693.

No. 05–9098. Hite *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 425 F. 3d 365.

No. 05–9099. Galloway *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 222.

No. 05–9100. HIGUERA-PINEDA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 137 Fed. Appx. 925.

No. 05–9122. ROCHA-CERDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 320.

No. 05–9123. ROMERO-PINA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 34.

No. 05–9125. LUKE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 152 Fed. Appx. 412.

No. 05–9126. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 148 Fed. Appx. 239.

No. 05–9127. CERDA-TOVAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 303.

No. 05–9130. ANDREWS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 943.

No. 05–9131. ALLEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 425 F. 3d 1231.

No. 05–9132. ARREOLA-AMAYA *v.* UNITED STATES (Reported below: 153 Fed. Appx. 305); TORRES-DIAZ *v.* UNITED STATES (438 F. 3d 529); CARBAJAL-HERNANDEZ *v.* UNITED STATES; GONZALEZ-OROZCO *v.* UNITED STATES (161 Fed. Appx. 426); DE LA CRUZ-GONZALEZ *v.* UNITED STATES (155 Fed. Appx. 801); NUNCIO-RODRIGUEZ *v.* UNITED STATES; SERAVIA-MELENDEZ *v.* UNITED STATES (154 Fed. Appx. 419); MONDRAGON-JIMENEZ *v.* UNITED STATES (154 Fed. Appx. 419); RODRIGUEZ-ZUNIGA *v.* UNITED STATES (155 Fed. Appx. 741); REYES-QUINTANILLA *v.* UNITED STATES (154 Fed. Appx. 415); HUEZO-FRANCO *v.* UNITED STATES (147 Fed. Appx. 432); SANTOS-PADILLA *v.* UNITED STATES (147 Fed. Appx. 417); MONOTO *v.* UNITED STATES (162 Fed. Appx. 377); HINOJOSA-SOTO *v.* UNITED STATES (153 Fed. Appx. 309); GANDARILLA-HERNANDEZ *v.* UNITED STATES (157 Fed. Appx. 772); MARTINEZ-CORPUS *v.* UNITED STATES (152 Fed. Appx. 426); and MORALES-CORDOVA *v.* UNITED STATES (153 Fed. Appx. 282). C. A. 5th Cir. Certiorari denied.

No. 05–9133. ALEXIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 469.

No. 05–9137. Rivas *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 148 Fed. Appx. 245.

No. 05–9140. Arias-Setina *v.* United States (Reported below: 147 Fed. Appx. 420); Borunda-Rivera *v.* United States (153 Fed. Appx. 317); Cabrera-Ibarra *v.* United States (153 Fed. Appx. 941); Campos-Mendoza *v.* United States (153 Fed. Appx. 320); Caro-Payan *v.* United States (153 Fed. Appx. 267); Cisneros-Lopez *v.* United States (147 Fed. Appx. 419); Escobar-Galdamez *v.* United States (153 Fed. Appx. 321); Flores-Fortier *v.* United States (147 Fed. Appx. 419); Garcia *v.* United States (153 Fed. Appx. 324); Garcia-Gonzalez *v.* United States (153 Fed. Appx. 277); Morales-Chirinos *v.* United States (147 Fed. Appx. 432); Paz-Gonzalez *v.* United States (153 Fed. Appx. 274); Ramirez-Navarro *v.* United States (153 Fed. Appx. 310); and Sanchez-Parra *v.* United States (153 Fed. Appx. 938). C. A. 5th Cir. Certiorari denied.

No. 05–9147. Perry *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 272.

No. 05–9150. Torres-Amador *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 05–9160. Washington *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 884 A. 2d 1080.

No. 05–589. Whorton, Director, Nevada Department of Corrections, et al. *v.* Collier. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 408 F. 3d 1279.

No. 05–841. Teamsters Pension Trust Fund of Philadelphia and Vicinity *v.* DiGiacomo. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 420 F. 3d 220.

No. 05–902. Bramlage et ux. *v.* Wells Fargo Home Mortgage, Inc. C. A. 6th Cir. Certiorari denied. Justice Breyer took no part in the consideration or decision of this petition. Reported below: 144 Fed. Appx. 489.

No. 05–923. Bunton *v.* Bentley. Ct. App. Tex., 12th Dist. Motion of Reporters Committee for Freedom of the Press for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 176 S. W. 3d 21.

No. 05–8388. Young *v.* Desuta, Superintendent, State Regional Correctional Facility at Mercer, et al. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition.

No. 05–8539. Hodge *v.* Harvey, Secretary of the Army, et al. C. A. D. C. Cir. Certiorari denied. The Chief Justice took no part in the consideration or decision of this petition.

*Rehearing Denied*

No. 04–721. Evans, Acting Warden *v.* Chavis, 546 U. S. 189;
No. 05–6735. Suarez *v.* Florida, 546 U. S. 1063;
No. 05–6928. Nation *v.* United States, 546 U. S. 1011;
No. 05–7287. Day-Petrano *v.* Circuit Court of Florida, Pinellas County, et al., 546 U. S. 1105;
No. 05–7477. Lehmkuhl *v.* Colorado, 546 U. S. 1109;
No. 05–7512. Allen *v.* Potter, Postmaster General, et al., 546 U. S. 1110;
No. 05–7533. Bumpus *v.* Wiley, Warden, 546 U. S. 1110;
No. 05–7562. Dixon *v.* Illinois Department of Employment Security et al., 546 U. S. 1141;
No. 05–7585. Misiak *v.* Washington et al., 546 U. S. 1142;
No. 05–7604. Dunlap *v.* Michigan, 546 U. S. 1113;
No. 05–7678. Richardson *v.* United States, 546 U. S. 1117;
No. 05–7679. Akmal *v.* Rawers, Warden, 546 U. S. 1151;
No. 05–7680. Akmal *v.* Rawers, Warden, 546 U. S. 1152;
No. 05–7681. Akmal *v.* Rawers, Warden, 546 U. S. 1152;
No. 05–7803. Saldana *v.* United States, 546 U. S. 1122;
No. 05–7981. Arnaiz *v.* United States, 546 U. S. 1127;
No. 05–8127. Balsewicz *v.* Kingston, Warden, 546 U. S. 1144; and
No. 05–8132. In re Faust, 546 U. S. 1088. Petitions for rehearing denied.

No. 05–479. Michau *v.* Jones, 546 U. S. 1130. Petition for rehearing denied. The Chief Justice took no part in the consideration or decision of this petition.

No. 05–140. Keyter *v.* Bush, President of the United States, 546 U. S. 875; and

No. 05–6625. Gordon *v.* Hendricks, 546 U. S. 1040. Motions for leave to file petitions for rehearing denied.

### March 15, 2006

*Certiorari Denied*

No. 05–9721 (05A853). Hughes *v.* Livingston, Executive Director, Texas Department of Criminal Justice, et al. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied. Reported below: 170 Fed. Appx. 878.

### March 16, 2006

*Certiorari Denied*

No. 05–9768 (05A858). Moody *v.* Beck, Secretary, North Carolina Department of Correction, et al. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to The Chief Justice, and by him referred to the Court, denied. Certiorari denied.

### March 17, 2006

*Miscellaneous Orders*

No. 05–130. eBay Inc. et al. *v.* MercExchange, L. L. C. C. A. Fed. Cir. [Certiorari granted, 546 U. S. 1029.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 05–260. Sereboff et ux. *v.* Mid Atlantic Medical Services, Inc. C. A. 4th Cir. [Certiorari granted, 546 U. S. 1030.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

### March 20, 2006

*Affirmed on Appeal*

No. 05–526. Nitke et al. *v.* Gonzales, Attorney General. Affirmed on appeal from D. C. S. D. N. Y. Reported below: 413 F. Supp. 2d 262.

*Certiorari Dismissed*

No. 05–8436. Vora *v.* Pennsylvania State Police. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pau-*

*peris* denied, and certiorari dismissed. See this Court's Rule 39.8. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 140 Fed. Appx. 433.

No. 05–8562. DIXON *v.* CITY OF MINNEAPOLIS, MINNESOTA, ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam).* JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 132 Fed. Appx. 677.

*Miscellaneous Orders*

No. 05M66. QLT, INC. *v.* MASSACHUSETTS EYE AND EAR INFIRMARY. Motion for leave to file a petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 05M67. WALDRIP *v.* TERRY, WARDEN;

No. 05M69. SCHAFLER *v.* SPEAR (two judgments);

No. 05M70. ACOSTA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION;

No. 05M71. RANDOLPH *v.* FLORIDA COMMISSION ON HUMAN RELATIONS, DIVISION OF ADMINISTRATIVE HEARINGS, ET AL.; and

No. 05M72. THOMAS *v.* SCHNUCKS MARKETS, INC. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 05M68. SCHAFLER *v.* SPEAR ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied. JUSTICE BREYER took no part in the consideration or decision of this motion.

No. 05–184. HAMDAN *v.* RUMSFELD, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. [Certiorari granted, 546 U. S. 1002.] Motion of Scott L. Fenstermaker et al. for leave to file a brief as *amici curiae* out of time denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 05–204. LEAGUE OF UNITED LATIN AMERICAN CITIZENS ET AL. *v.* PERRY, GOVERNOR OF TEXAS, ET AL.;

No. 05–254. TRAVIS COUNTY, TEXAS, ET AL. *v.* PERRY, GOVERNOR OF TEXAS, ET AL.;

No. 05–276. JACKSON ET AL. *v.* PERRY, GOVERNOR OF TEXAS, ET AL.; and

No. 05–439. GI FORUM OF TEXAS ET AL. *v.* PERRY, GOVERNOR OF TEXAS, ET AL. D. C. E. D. Tex. [Probable jurisdiction noted, 546 U. S. 1074.] Motion of Travis County appellants for leave to file a supplemental brief after argument denied. Motion of appellee Charles Soechting for leave to file a supplemental brief after argument granted.

No. 05–380. GONZALES, ATTORNEY GENERAL *v.* CARHART ET AL. C. A. 8th Cir. [Certiorari granted, 546 U. S. 1169.] Motion of Margie Riley et al. for leave to file a brief as *amici curiae* granted.

No. 05–502. BRIGHAM CITY, UTAH *v.* STUART ET AL. Sup. Ct. Utah. [Certiorari granted, 546 U. S. 1085.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 05–853. MCGOWAN *v.* NJR SERVICE CORP. ET AL. C. A. 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 05–5966. CLARK *v.* ARIZONA. Ct. App. Ariz. [Certiorari granted, 546 U. S. 1060.] Motion of petitioner for appointment of counsel granted. David Goldberg, Esq., of Flagstaff, Ariz., is appointed to serve as counsel for petitioner in this case.

No. 05–8794. HILL *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. [Certiorari granted *sub nom. Hill* v. *Crosby, Secretary, Florida Department of Corrections, et al.*, 546 U. S. 1158.] Motion of Bradley A. MacLean et al. for leave to file a brief as *amici curiae* granted.

No. 05–9191. IN RE REHBERGER;

No. 05–9206. IN RE SHERMAN; and

No. 05–9337. IN RE CAICEDO VARGAS. Petitions for writs of habeas corpus denied.

No. 05–9105. In re Holt. Petition for writ of prohibition denied.

*Certiorari Denied*

No. 04–1502. Horn Farms, Inc. *v.* Johanns, Secretary of Agriculture, et al. C. A. 7th Cir. Certiorari denied. Reported below: 397 F. 3d 472.

No. 05–457. Commonwealth of the Northern Mariana Islands *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 399 F. 3d 1057.

No. 05–594. Philip Morris USA *v.* Boeken, Trustee; and
No. 05–600. Boeken, Trustee *v.* Philip Morris USA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 127 Cal. App. 4th 1640, 29 Cal. Rptr. 3d 638.

No. 05–605. Mapu *v.* Nicholson, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 397 F. 3d 1375.

No. 05–628. North Dakota, Through the North Dakota Department of Health, et al. *v.* United States Army Corps of Engineers et al. C. A. 8th Cir. Certiorari denied. Reported below: 418 F. 3d 915.

No. 05–633. Koziol et ux. *v.* Bombardier-Rotax GmbH Motorenfabrik et al. C. A. 11th Cir. Certiorari denied. Reported below: 129 Fed. Appx. 543.

No. 05–720. Pham, as Personal Representative of the Estate of Pham, Deceased, et al. *v.* Hartford Fire Insurance Co. C. A. 4th Cir. Certiorari denied. Reported below: 419 F. 3d 286.

No. 05–754. Bradley, Personal Representative of the Estate of Bradley, Deceased *v.* City of Ferndale, Michigan, et al. C. A. 6th Cir. Certiorari denied. Reported below: 148 Fed. Appx. 499.

No. 05–762. White *v.* Nicholson, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 412 F. 3d 1314.

No. 05–775. Star Industries, Inc. *v.* Bacardi & Co. Ltd. et al. C. A. 2d Cir. Certiorari denied. Reported below: 412 F. 3d 373.

No. 05–847. Sina et ux. *v.* Mabley et al. C. A. 8th Cir. Certiorari denied. Reported below: 147 Fed. Appx. 616.

No. 05–855. Paul et al. *v.* Messing, Executrix of the Estate of Messing, Deceased. C. A. 6th Cir. Certiorari denied. Reported below: 147 Fed. Appx. 437.

No. 05–857. Madden et al. *v.* Stewart et al. C. A. 4th Cir. Certiorari denied. Reported below: 133 Fed. Appx. 892.

No. 05–858. Alston *v.* City of Philadelphia, Zoning Board of Adjustment, et al. Commw. Ct. Pa. Certiorari denied.

No. 05–859. Nexbank, SSB, et al. *v.* American HomePatient, Inc., et al. C. A. 6th Cir. Certiorari denied. Reported below: 414 F. 3d 614.

No. 05–861. Bowersock *v.* City of Lima, Ohio, et al. C. A. 6th Cir. Certiorari denied.

No. 05–863. Harris, as Administratrix of the Estate of Decedent Harris *v.* City of Chattanooga, Tennessee, et al. C. A. 6th Cir. Certiorari denied. Reported below: 137 Fed. Appx. 788.

No. 05–868. Jones et al. *v.* Bass et al. C. A. 10th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 764.

No. 05–869. Rinehart *v.* Schmidt. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 05–875. Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division *v.* Draughon. C. A. 5th Cir. Certiorari denied. Reported below: 427 F. 3d 286.

No. 05–880. LaHaye *v.* Israel Aircraft Industries. C. A. 9th Cir. Certiorari denied. Reported below: 144 Fed. Appx. 631.

No. 05–882. Sheboygan County Department of Health and Human Services, Division of Social Services *v.* Ra-

CHEL B. Sup. Ct. Wis. Certiorari denied. Reported below: 282 Wis. 2d 150, 698 N. W. 2d 631.

No. 05–885. KOLJCEVIC *v.* GONZALES, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 132 Fed. Appx. 600.

No. 05–886. URBAN *v.* HAAG ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 125 Fed. Appx. 336.

No. 05–887. HARRISON AIRE, INC. *v.* AEROSTAR INTERNATIONAL, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 423 F. 3d 374.

No. 05–888. EVERETTE-OATES *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 4th Cir. Certiorari denied. Reported below: 131 Fed. Appx. 412.

No. 05–889. DEAN *v.* BYERLEY. C. A. 6th Cir. Certiorari denied.

No. 05–891. SIDNEY COAL CO., INC., ET AL. *v.* SOCIAL SECURITY ADMINISTRATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 427 F. 3d 336.

No. 05–904. SMOTHERS *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 418 F. 3d 711.

No. 05–906. MOHNEY ET AL. *v.* BAUER, INC., FKA COOPER OF CANADA LTD. C. A. 6th Cir. Certiorari denied. Reported below: 138 Fed. Appx. 804.

No. 05–909. POWER RESOURCE GROUP, INC. *v.* HUDSON, CHAIRMAN, TEXAS PUBLIC UTILITY COMMISSION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 422 F. 3d 231.

No. 05–910. SIMASKO *v.* ST. CLAIR COUNTY, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 417 F. 3d 559.

No. 05–913. TUCKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 419 F. 3d 719.

No. 05–917. ALLISON ET UX. *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. Super. Ct. Wash., King County. Certiorari denied.

No. 05–931. MINUS *v.* DAK AMERICAS. C. A. 4th Cir. Certiorari denied. Reported below: 141 Fed. Appx. 192.

No. 05–934. ERNST ET AL. *v.* RISING, TREASURER OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 427 F. 3d 351.

No. 05–937. VENTURA GROUP VENTURES, INC. *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 633.

No. 05–942. BIONG ROBOCA *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 138 Fed. Appx. 927.

No. 05–953. KENNEDY *v.* GRATTAN TOWNSHIP, MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 05–958. SHEIKH *v.* 7-ELEVEN. C. A. 4th Cir. Certiorari denied. Reported below: 142 Fed. Appx. 785.

No. 05–973. WARNOCK *v.* NATIONAL FOOTBALL LEAGUE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 154 Fed. Appx. 291.

No. 05–976. BRODT *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 388 Md. 98, 879 A. 2d 42.

No. 05–1001. HAZLEWOOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 05–1008. HALL ET UX., INDIVIDUALLY AND AS NEXT FRIENDS ON BEHALF OF THEIR MINOR CHILDREN DOE ET AL. *v.* SHIPLEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 809.

No. 05–1010. ISBELL *v.* ALLSTATE INSURANCE CO. C. A. 7th Cir. Certiorari denied. Reported below: 418 F. 3d 788.

No. 05–1013. POLLARD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 416 F. 3d 48.

No. 05–1022. NORFLEET *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 143 Fed. Appx. 645.

No. 05–1029. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–1041. BROWN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 429 F. 3d 19.

No. 05–5902. SANTIAGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 410 F. 3d 193.

No. 05–6789. ROSEN *v.* WALSH, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY, ET AL.; and

No. 05–7035. BROWN *v.* ERCOLE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 409 F. 3d 523.

No. 05–7252. LEECH *v.* ANDREWS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 140 Fed. Appx. 803.

No. 05–7268. WALDEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–7336. SIMMONS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–7376. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 383 F. 3d 700.

No. 05–7479. RIVAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–7552. CONTRERAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 105.

No. 05–7573. SILLAS-CEBREROS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 148 Fed. Appx. 684.

No. 05–7584. TREVINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 419 F. 3d 896.

No. 05–7708. BROWN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 907 So. 2d 1.

No. 05–7770. OSBORNE *v.* PURKETT, SUPERINTENDENT, EASTERN RECEPTION, DIAGNOSTIC, AND CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 411 F. 3d 911.

No. 05–7781. HINOJOSA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS

Division. C. A. 5th Cir. Certiorari denied. Reported below: 141 Fed. Appx. 395.

No. 05–8065. Brown *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 415 F. 3d 1257.

No. 05–8149. Dumeisi *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 424 F. 3d 566.

No. 05–8498. Gordon *v.* Chase et al. C. A. 4th Cir. Certiorari denied. Reported below: 140 Fed. Appx. 472.

No. 05–8500. Martinez *v.* Ryan, Acting Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 05–8502. Marcrum *v.* Illinois. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 356 Ill. App. 3d 1146, 889 N. E. 2d 816.

No. 05–8507. Broades *v.* Sirmons, Warden. C. A. 10th Cir. Certiorari denied.

No. 05–8512. Crookes *v.* Harrison, Warden. C. A. 9th Cir. Certiorari denied.

No. 05–8513. Broades *v.* Gibson, Warden. C. A. 10th Cir. Certiorari denied.

No. 05–8516. Amand *v.* Jordan, Warden, et al. C. A. 10th Cir. Certiorari denied.

No. 05–8519. Paine *v.* Sandoval et al. C. A. 9th Cir. Certiorari denied.

No. 05–8534. Glagola *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 355 Ill. App. 3d 1177, 885 N. E. 2d 575.

No. 05–8536. Gass *v.* CWCapital LLC. C. A. 9th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 605.

No. 05–8538. Fore *v.* Bostik Findley, Inc. C. A. 7th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 513.

No. 05–8540. Gant *v.* Texas. Ct. App. Tex., 9th Dist. Certiorari denied. Reported below: 153 S. W. 3d 294.

No. 05–8546. Ratliff *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 914 So. 2d 938.

No. 05–8548. Shavkey *v.* Metrish, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–8549. Redford *v.* Georgia. Ct. App. Ga. Certiorari denied.

No. 05–8550. Smith *v.* Mosley, Warden, et al. C. A. 11th Cir. Certiorari denied.

No. 05–8558. Campbell *v.* Myers, Warden, et al. C. A. 6th Cir. Certiorari denied.

No. 05–8560. DeRosa *v.* Zon, Superintendent, Wende Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 05–8564. Langford *v.* UNUM Life Insurance Company of America et al. C. A. 11th Cir. Certiorari denied. Reported below: 138 Fed. Appx. 162.

No. 05–8567. Glassel *v.* Arizona. Sup. Ct. Ariz. Certiorari denied. Reported below: 211 Ariz. 33, 116 P. 3d 1193.

No. 05–8568. Mendoza *v.* Texas. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 05–8570. Sias *v.* Louisiana et al. C. A. 5th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 719.

No. 05–8575. Bailey *v.* Turner et al. C. A. 5th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 276.

No. 05–8581. Anderson *v.* Maryland et al. C. A. 4th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 682.

No. 05–8589. Housley *v.* Fatkin, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 148 Fed. Appx. 739.

No. 05–8596. Torres *v.* Ocular Sciences Puerto Rico. C. A. 1st Cir. Certiorari denied.

No. 05–8597. Vlasich *v.* Scribner, Warden. C. A. 9th Cir. Certiorari denied.

No. 05–8598. TAKABAYASHI *v.* WOODFORD, ACTING SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 05–8601. COUPE *v.* ABRAMSON, ASSOCIATE JUSTICE, SUPERIOR COURT OF NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied.

No. 05–8602. CROW *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 05–8605. CLAY *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–8606. LUNA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 05–8623. ELLIS *v.* EMERY, TRUSTEE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 142 Fed. Appx. 324.

No. 05–8626. CARPENTER *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 275 Conn. 785, 882 A. 2d 604.

No. 05–8628. CHAVEZ *v.* ESTEP, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 77.

No. 05–8634. REIKER *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 911 So. 2d 115.

No. 05–8638. BUTLER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 917 So. 2d 192.

No. 05–8640. HERNANDEZ SALAS *v.* YATES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–8641. RUMPH *v.* GOFFNEY ET AL. C. A. 5th Cir. Certiorari denied.

No. 05–8648. KOERNER *v.* GRIGAS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–8650. WRIGHT *v.* RYAN, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–8651. PURVIS *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 829 N. E. 2d 572.

No. 05–8665. NADASDY *v.* SANTA CLARA COUNTY DEPARTMENT OF CHILD SUPPORT SERVICES. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 05–8673. SIZEMORE *v.* WOODFORD, ACTING SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 05–8674. DOBSON *v.* BURGE, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 150 Fed. Appx. 49.

No. 05–8676. DOMINGUEZ *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 05–8691. PARADELA *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–8692. JONES *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 19 App. Div. 3d 220, 797 N. Y. S. 2d 63.

No. 05–8693. JORDAN *v.* B. F. FIELDS MOVING & STORAGE, INC. Super. Ct. Pa. Certiorari denied. Reported below: 864 A. 2d 589.

No. 05–8697. WALENDZINSKI *v.* RENICO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 05–8702. PANIZZON *v.* YATES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–8733. BOLEY *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 05–8739. MATSON *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 33 Kan. App. 2d xviii, 106 P. 3d 1161.

No. 05–8747. ALLEN *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 6th Cir. Certiorari denied.

No. 05–8756. Rodriguez *v.* Fernandes. App. Ct. Conn. Certiorari denied. Reported below: 90 Conn. App. 601, 879 A. 2d 897.

No. 05–8798. Marshall *v.* City of Saint Paul, Minnesota. C. A. 8th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 856.

No. 05–8804. Johnson *v.* Scribner, Warden. C. A. 9th Cir. Certiorari denied.

No. 05–8819. Johnson *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 352 Ill. App. 3d 1223, 879 N. E. 2d 1066.

No. 05–8838. Ellis *v.* Kessner, Duca, Umebayashi, Bain & Matsunaga. C. A. 9th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 604.

No. 05–8840. Dancy *v.* Pitcher, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–8856. Dixon *v.* Barnhart, Commissioner of Social Security. C. A. 11th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 810.

No. 05–8862. Roberson *v.* Barnhart, Commissioner of Social Security. C. A. 4th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 686.

No. 05–8889. Jacob *v.* Beard, Secretary, Pennsylvania Department of Corrections, et al. C. A. 3d Cir. Certiorari denied.

No. 05–8911. Ford *v.* City of Birmingham, Alabama. C. A. 11th Cir. Certiorari denied. Reported below: 144 Fed. Appx. 51.

No. 05–9007. Goss *v.* Department of the Air Force. C. A. Fed. Cir. Certiorari denied. Reported below: 131 Fed. Appx. 721.

No. 05–9008. Green *v.* Ohio. Ct. App. Ohio, Stark County. Certiorari denied.

No. 05–9045. Hunt *v.* Roberts, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 139 Fed. Appx. 123.

No. 05–9046. GRADY *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 05–9068. PAYNE *v.* VIRGINIA ET AL. Sup. Ct. Va. Certiorari denied.

No. 05–9079. PAGE *v.* KINGSTON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 05–9088. ALVARADO-RIVERA *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 588.

No. 05–9103. HARRIS *v.* BASSETT, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 136 Fed. Appx. 589.

No. 05–9116. RAMIREZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 05–9119. RALPH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 05–9139. TAYLOR *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 7th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 558.

No. 05–9142. STOLTZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 567.

No. 05–9155. ANGULO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–9162. MCKISSIC *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 428 F. 3d 719.

No. 05–9165. RUFF *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 807.

No. 05–9167. COGDELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 162.

No. 05–9169. VILLAGRANA *v.* BEZY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 05–9176. CISNEROS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 591.

No. 05–9178. Jones *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 204.

No. 05–9179. Putnam *v.* Hastings, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–9180. Jones *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 435 F. 3d 541.

No. 05–9183. Benitez-Rodriguez, aka Rodriguez-Benitez, aka Benitez, aka Benitez Noblez, aka Ponce *v.* United States; Ferrer-Castaneda *v.* United States; Loreto-Valerio *v.* United States; Luis-Rodriguez *v.* United States; Patillo-Gonzalez *v.* United States; Reyes-Martinez, aka Reyes *v.* United States; Rogel-Perez *v.* United States; Soliz-Marquez *v.* United States; and Terrazas-Aguado *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 147 Fed. Appx. 422 (seventh judgment); 148 Fed. Appx. 244 (eighth judgment) and 245 (sixth judgment); 153 Fed. Appx. 271 (first judgment), 305 (third judgment), 317 (fourth judgment), 318 (ninth judgment), and 942 (fifth judgment); 161 Fed. Appx. 341 (second judgment).

No. 05–9184. Almaraz-Ramirez *v.* United States (Reported below: 148 Fed. Appx. 242); Avila-Reyes *v.* United States (153 Fed. Appx. 275); Balderas-Galvan *v.* United States (147 Fed. Appx. 424); Bonilla-Velasquez *v.* United States (147 Fed. Appx. 425); Castillo-Lopez *v.* United States (147 Fed. Appx. 431); Cavazos-Valdez *v.* United States (148 Fed. Appx. 246); Contreras-Granados, aka Diaz-Fierro *v.* United States (153 Fed. Appx. 323); Corona-Yanez *v.* United States (155 Fed. Appx. 118); Delgado-Palamaros *v.* United States (158 Fed. Appx. 242); Diaz-Ponce *v.* United States (153 Fed. Appx. 280); Dominguez-Martinez *v.* United States (153 Fed. Appx. 274); Ek-Canul, aka Flores-Tijerina *v.* United States (153 Fed. Appx. 298); Escobedo-Martinez *v.* United States (147 Fed. Appx. 421); Euceda-Cruz, aka Cruz *v.* United States (153 Fed. Appx. 278); Gonzalez-Barroza *v.* United States (153 Fed. Appx. 319); Gutierrez-Estrada *v.* United States (147 Fed. Appx. 414); Hernandez *v.* United States (147 Fed. Appx. 423); Hernandez-Cerros *v.* United States (148 Fed. Appx. 240); Hernandez-Resendez *v.* United States (147 Fed. Appx. 418); Jasso-Cuevas *v.* United States (153 Fed. Appx. 321); Landin-

PUENTES *v.* UNITED STATES (153 Fed. Appx. 316); LOPEZ-LIMON, AKA LIMON *v.* UNITED STATES (148 Fed. Appx. 237); MENDEZ-MARROQUIN *v.* UNITED STATES; MENDOZA-GONZALEZ, AKA BARRERA-RAMOS, AKA ZAPATA-FIERO *v.* UNITED STATES (148 Fed. Appx. 238); MEZA-MEZA, AKA SANCHEZ-MEZA *v.* UNITED STATES (153 Fed. Appx. 315); OLIVARES-CABRERA *v.* UNITED STATES (153 Fed. Appx. 310); ORTIZ-LARA *v.* UNITED STATES (153 Fed. Appx. 939); PULGARIN-RUBIO *v.* UNITED STATES (147 Fed. Appx. 428); RAMIREZ *v.* UNITED STATES (148 Fed. Appx. 236); RAMIREZ-RAMIREZ *v.* UNITED STATES (153 Fed. Appx. 940); RODRIGUEZ-ALVARADO *v.* UNITED STATES (153 Fed. Appx. 941); ROMERO-GARCIA, AKA ROMERO *v.* UNITED STATES (153 Fed. Appx. 314); SANCHEZ *v.* UNITED STATES (153 Fed. Appx. 318); TORRES-ROBLES, AKA VIDAL, AKA PARRA, AKA VASQUEZ IBARRA, AKA IBARRA, AKA TORRES *v.* UNITED STATES (147 Fed. Appx. 423); VALLES-MARTINEZ *v.* UNITED STATES (153 Fed. Appx. 322); and ZAVALA-GARCIA *v.* UNITED STATES (147 Fed. Appx. 425). C. A. 5th Cir. Certiorari denied.

No. 05–9185. RODRIGUEZ-CHAVEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 524.

No. 05–9188. CRUZ-NAJERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–9190. RILEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 137 Fed. Appx. 575.

No. 05–9193. PHILLIPS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 413 F. 3d 1288.

No. 05–9194. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 894.

No. 05–9195. MEDINA LIMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 302.

No. 05–9196. LATOS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. Reported below: 137 Fed. Appx. 373.

No. 05–9198. MENDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 05–9200. WADE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 403.

No. 05–9203. GARCIA *v.* UNITED STATES; and BROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 05–9204. BRADLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 05–9207. MORENO SERVIN, AKA MARTINEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 145 Fed. Appx. 565.

No. 05–9208. RAPOSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 05–9209. JUDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 601.

No. 05–9215. CALDERILLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 05–9216. EPSTEIN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 426 F. 3d 431.

No. 05–9217. ERWIN *v.* FEDERAL BUREAU OF PRISONS. C. A. D. C. Cir. Certiorari denied.

No. 05–9219. GAONA-TOVAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 05–9220. POZOS-SANTILLAN *v.* UNITED STATES; GARZA-GARCIA *v.* UNITED STATES; FERNANDEZ-PINONES *v.* UNITED STATES; LUGO-SALDANA *v.* UNITED STATES; BARRIOS-PEREZ *v.* UNITED STATES; SALAZAR-VARELA *v.* UNITED STATES; and CONTRERAS-CEDILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 167 Fed. Appx. 371 (seventh judgment).

No. 05–9226. ALDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 141 Fed. Appx. 562.

No. 05–9227. ANDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 218.

No. 05–9230. LINEBERRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 743.

No. 05–9231. Williams *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 05–9234. Vilchez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 121.

No. 05–9235. Quigg *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 152 Fed. Appx. 551.

No. 05–9236. Surace *v.* United States et al. C. A. 3d Cir. Certiorari denied. Reported below: 147 Fed. Appx. 287.

No. 05–9239. Guerra *v.* United States; De Leon-Rocha *v.* United States; Cunningham *v.* United States; and Lozano-Tamez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 712 (fourth judgment); 159 Fed. Appx. 558 (third judgment).

No. 05–9240. Hickman, aka Saunders *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 553.

No. 05–9242. Hernandez-Martinez, aka Martinez-Hernandez, aka Gabone *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 778.

No. 05–9245. Gorton *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 165 Fed. Appx. 346.

No. 05–9249. Floyd *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 236.

No. 05–9250. Herrera *v.* United States; Martinez Aviles *v.* United States; Rivas-Garcia *v.* United States; and Tersero-Aguilar *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 992 (third judgment); 163 Fed. Appx. 556 (second judgment), 569 (first judgment), and 570 (fourth judgment).

No. 05–9251. Rodriguez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 900.

No. 05–9253. Simmerer *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 124.

No. 05–9254. Mojica-Rivera *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 435 F. 3d 28.

No. 05–9256. Covarrubias-Covarrubias *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 148 Fed. Appx. 239.

No. 05–9259. Durham *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 05–9263. Mar-Ramirez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 147 Fed. Appx. 430.

No. 05–9266. Alarcon-Aros *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 148 Fed. Appx. 240.

No. 05–9267. Moreno-De La Cruz *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 273.

No. 05–9269. Meadows *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 197.

No. 05–9270. Olivas-Alire, aka Olivas *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 273.

No. 05–9273. Sherman *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 05–9274. Saulter *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 05–9277. Curnett *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 123 Fed. Appx. 733.

No. 05–9279. Downing *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 2.

No. 05–9281. Dale *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 422.

No. 05–9285. Bothun *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 827.

No. 05–9286. Thomas *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 348.

No. 05–9287. Shull *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 650.

No. 05–9288. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 747.

No. 05–9290. SILVESTRE *v.* YOST, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 159 Fed. Appx. 355.

No. 05–9292. FOBBS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 337.

No. 05–9293. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 430 F. 3d 317.

No. 05–9295. GILLIAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 169.

No. 05–9297. HINOJOSA-AGUIRRE *v.* UNITED STATES; PIZANA *v.* UNITED STATES; KOCEVAR *v.* UNITED STATES; HERNANDEZ *v.* UNITED STATES; MOTA *v.* UNITED STATES; and BARNES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 287 (second judgment) and 308 (third judgment); 158 Fed. Appx. 555 (fourth judgment) and 559 (fifth judgment); 160 Fed. Appx. 355 (first judgment); 168 Fed. Appx. 4 (sixth judgment).

No. 05–9298. GARCIA-CHAVEZ *v.* UNITED STATES; OLVERA-MORENO *v.* UNITED STATES; REYNA-SALINAS *v.* UNITED STATES; RODRIGUEZ-DOMINGUEZ *v.* UNITED STATES; URBANO-TORREZ *v.* UNITED STATES; RUIZ-SANTIAGO, AKA RUBIO-CANDIA *v.* UNITED STATES; SANCHEZ-MONTES, AKA GAYTAN-MONTES *v.* UNITED STATES; and RAMOS-AQUINO, AKA RAMOS, AKA RAMOS-ADRIAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 147 Fed. Appx. 426 (first judgment) and 428 (seventh judgment); 153 Fed. Appx. 276 (second judgment), 298 (eighth judgment), 301 (fifth judgment), 314 (third judgment), 938 (sixth judgment), and 942 (fourth judgment).

No. 05–9300. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–9301. FAZZINI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 414 F. 3d 695.

No. 05–9303. IBARRA CANTELLANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 430 F. 3d 1142.

No. 05–9307. Morton *v.* United States. Ct. App. D. C. Certiorari denied.

No. 05–9308. Hager *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 856 A. 2d 1143 and 861 A. 2d 601.

No. 05–9315. Washington *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 625.

No. 05–9316. Warren *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 264.

No. 05–9317. Coleman *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 323.

No. 05–9327. Palacios-Quinonez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 3d 471.

No. 05–650. Igartua de la Rosa et al. *v.* United States. C. A. 1st Cir. Motion of Michael Richardson for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 417 F. 3d 145.

No. 05–751. Van Poyck *v.* Florida. Sup. Ct. Fla. Motion of Florida Innocence Initiative, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 908 So. 2d 326.

No. 05–779. Verniero et al. *v.* Gibson. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 411 F. 3d 427.

No. 05–895. Pigford et al. *v.* Johanns, Secretary of Agriculture. C. A. D. C. Cir. Certiorari denied. The Chief Justice took no part in the consideration or decision of this petition. Reported below: 416 F. 3d 12.

No. 05–965. Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division *v.* Guidry. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 397 F. 3d 306.

No. 05–966. Cathel, Administrator, New Jersey State Prison, et al. *v.* Marshall. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 428 F. 3d 452.

No. 05–1005. Swint *v.* United States. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition.

No. 05–7588. Jones *v.* United States. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 128 Fed. Appx. 938.

No. 05–7864. Fritz *v.* United States. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 140 Fed. Appx. 383.

No. 05–8551. Shaw *v.* Wynder, Superintendent, State Correctional Institution at Dallas, et al. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition.

No. 05–8630. Bonds *v.* Ortiz, Administrator, East Jersey State Prison, et al. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition.

No. 05–8679. Merced *v.* Kirkland, Warden. C. A. 9th Cir. Certiorari denied. Justice Breyer took no part in the consideration or decision of this petition. Reported below: 426 F. 3d 1076 and 157 Fed. Appx. 7.

No. 05–8867. Draper *v.* DiGuglielmo, Superintendent, State Correctional Institution at Graterford, et al. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition.

No. 05–9311. Byrd *v.* United States. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 155 Fed. Appx. 58.

*Rehearing Denied*

No. 04–597. Unitherm Food Systems, Inc. *v.* Swift-Eckrich, Inc., dba ConAgra Refrigerated Foods, 546 U. S. 394;

No. 04–10662. Alves *v.* Gonzales, Attorney General, 546 U. S. 864;

No. 05–637. STEPHENS *v.* GEORGIA DEPARTMENT OF TRANSPORTATION, 546 U. S. 1095;

No. 05–707. SHOBAR ET AL. *v.* CALIFORNIA ET AL., 546 U. S. 1150;

No. 05–6005. GULLY *v.* NEW YORK COMMISSIONER OF LABOR, 546 U. S. 1097;

No. 05–6274. CAMPBELL *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 546 U. S. 1018;

No. 05–6973. COTA *v.* CAMBRA, WARDEN, 546 U. S. 1099;

No. 05–7018. QURESHI *v.* CITY OF DEARBORN, MICHIGAN, ET AL., 546 U. S. 1100;

No. 05–7260. ANDERSON ET AL. *v.* LASALLE STEEL CO. ET AL., 546 U. S. 1104;

No. 05–7298. BRIGGS *v.* CINCINNATI COURT INDEX NEWSPAPER, 546 U. S. 1105;

No. 05–7369. BROWN *v.* FLORIDA, 546 U. S. 1107;

No. 05–7468. MCKINLEY *v.* TEXAS, 546 U. S. 1109;

No. 05–7480. MOORE *v.* UNITED STATES, 546 U. S. 1079;

No. 05–7492. GOODEN *v.* MATHES, WARDEN, 546 U. S. 1140;

No. 05–7547. TAYLOR *v.* QUARANTELLO ET AL., 546 U. S. 1141;

No. 05–7645. IN RE MONTFORD, 546 U. S. 1149;

No. 05–7767. MCCLENDON *v.* KANE COUNTY JAIL, 546 U. S. 1120;

No. 05–8023. JONES *v.* UNITED STATES, 546 U. S. 1128; and

No. 05–8042. COHEN *v.* UNITED STATES, 546 U. S. 1129. Petitions for rehearing denied.

### MARCH 24, 2006

*Miscellaneous Order*

No. 04–1170. KANSAS *v.* MARSH. Sup. Ct. Kan. [Certiorari granted, 544 U. S. 1060.] Case restored to calendar for reargument.

### MARCH 27, 2006

*Certiorari Granted—Vacated and Remanded*

No. 04–1679. MILLER *v.* COLORADO. Ct. App. Colo. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Georgia* v. *Randolph*, *ante*, p. 103. Reported below: 94 P. 3d 1197.

*Certiorari Dismissed*

No. 05–9074. KULKA *v.* CALIFORNIA. Sup. Ct. Cal. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 05–9320. JACKSON *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals,* 506 U. S. 1 (1992) *(per curiam).* JUSTICE STEVENS dissents. See *id.,* at 4, and cases cited therein.

*Miscellaneous Orders.* (See also No. 8, Orig., *ante,* p. 150.)

No. 05M73. GARCIA-MEJIA *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 05M74. BORESS *v.* REYNOLDS ET AL.; and

No. 05M75. CARLTON *v.* OFFICE OF PERSONNEL MANAGEMENT. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 04–473. GARCETTI ET AL. *v.* CEBALLOS. C. A. 9th Cir. [Certiorari granted, 543 U. S. 1186.] Motion of Elaine Mittleman for leave to file a brief as *amicus curiae* out of time denied.

No. 05–18. ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION *v.* MURPHY ET VIR. C. A. 2d Cir. [Certiorari granted, 546 U. S. 1085.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 05–5966. CLARK *v.* ARIZONA. Ct. App. Ariz. [Certiorari granted, 546 U. S. 1060.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 05–8701. SUMMERVILLE *v.* LOCAL 77 ET AL. C. A. 4th Cir.; and

No. 05–8851. PHELPS ET UX. *v.* JONES, DBA J&J CONSTRUCTION, ET AL. C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 17, 2006, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 05–9554. IN RE AVERY. Petition for writ of habeas corpus denied. JUSTICE SOUTER took no part in the consideration or decision of this petition.

No. 05–8849. IN RE KING;
No. 05–9157. IN RE BEAVER; and
No. 05–9334. IN RE BURRELL. Petitions for writs of mandamus denied.

No. 05–8834. IN RE BANGURA;
No. 05–9338. IN RE TIDWELL; and
No. 05–9417. IN RE TIDWELL. Petitions for writs of mandamus and/or prohibition denied.

No. 05–8857. IN RE DIXON; and
No. 05–9411. IN RE BARNETT. Motions of petitioners for leave to proceed *in forma pauperis* denied, and petitions for writs of mandamus dismissed. See this Court's Rule 39.8.

### *Certiorari Granted*

No. 05–8820. LAWRENCE *v.* FLORIDA. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 421 F. 3d 1221.

### *Certiorari Denied*

No. 04–10653. JORDAN *v.* ALLGROUP WHEATON. C. A. 3d Cir. Certiorari denied. Reported below: 95 Fed. Appx. 462.

No. 05–791. GOLIN ET VIR *v.* ALLENBY, DIRECTOR, CALIFORNIA DEPARTMENT OF DEVELOPMENTAL SERVICES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 135 Fed. Appx. 978.

No. 05–802. SUNRISE CORPORATION OF MYRTLE BEACH, SOUTH CAROLINA, ET AL. *v.* CITY OF MYRTLE BEACH, SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 420 F. 3d 322.

No. 05–864. PICKETT ET AL. *v.* TYSON FRESH MEATS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 420 F. 3d 1272.

No. 05–890. STEEL *v.* DEPARTMENT FOR THE AGING OF THE CITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 14 App. Div. 3d 423, 787 N. Y. S. 2d 869.

No. 05–896. BOWMAN *v.* AMERICAN RIVER TRANSPORTATION CO. ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 217 Ill. 2d 75, 838 N. E. 2d 949.

No. 05–897. NEW YORK TIMES CO. *v.* HATFILL. C. A. 4th Cir. Certiorari denied. Reported below: 416 F. 3d 320.

No. 05–901. BRUENN *v.* NORTHROP GRUMMAN CORP. ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 05–914. WARD *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 420 F. 3d 479.

No. 05–920. SMITH *v.* CONSOLIDATED RECREATION AND COMMUNITY CENTER AND PLAYGROUND DISTRICT NUMBER 1 OF JEFFERSON PARISH, LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 131 Fed. Appx. 988.

No. 05–921. KING ET AL. *v.* GADSON ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 946 So. 2d 540.

No. 05–922. KLEINHAMMER *v.* HARRISON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–925. QUILLEN *v.* RAINES ET AL. Sup. Ct. Va. Certiorari denied.

No. 05–926. MACTEC, INC. *v.* GORELICK. C. A. 10th Cir. Certiorari denied. Reported below: 427 F. 3d 821.

No. 05–930. LANDES *v.* TARTAGLIONE, CHAIR, CITY COMMISSIONERS OF PHILADELPHIA, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 153 Fed. Appx. 131.

No. 05–943. POOLE, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, ET AL. *v.* HENRY. C. A. 2d Cir. Certiorari denied. Reported below: 409 F. 3d 48.

No. 05–947. HOROWITZ *v.* PEACE CORPS. C. A. D. C. Cir. Certiorari denied. Reported below: 428 F. 3d 271.

No. 05–981. NAVY FEDERAL CREDIT UNION *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 424 F. 3d 397.

No. 05–1046. PAPE ET AL. *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 918 So. 2d 240.

No. 05–1066. ARMCO EMPLOYEES INDEPENDENT FEDERATION, INC. *v.* AK STEEL CORP. C. A. 6th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 347.

No. 05–1091. ARNOLD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 192.

No. 05–1093. MCLEAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 249.

No. 05–1097. SANDERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 188.

No. 05–6848. FLAHERTY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 05–7320. MOLINA-URIBE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 429 F. 3d 514.

No. 05–7488. GROOME *v.* BRADY, SUPERINTENDENT, OLD COLONY CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied.

No. 05–7499. CRUTCHER *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 121 Nev. 1117, 152 P. 3d 760.

No. 05–7516. PHILLIPS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 143 Fed. Appx. 667.

No. 05–7640. FLETCHER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 580 Pa. 403, 861 A. 2d 898.

No. 05–7647. MARTINEZ-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 141 Fed. Appx. 334.

No. 05–7714. WILSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 36 Cal. 4th 309, 114 P. 3d 758.

No. 05–7850. BERTHELOT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 138 Fed. Appx. 700.

No. 05–7901. SWEARINGEN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 05–8026. CONRAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 147 Fed. Appx. 368.

No. 05–8195. MEREDITH I. *v.* CONNECTICUT DEPARTMENT OF CHILDREN AND FAMILIES ET AL. App. Ct. Conn. Certiorari denied.

No. 05–8508. COSTIEL *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 05–8699. SCHUSTER *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 05–8705. ACOSTA NUNEZ *v.* CHRONES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–8709. LANGHAM *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 356 Ill. App. 3d 1129, 889 N. E. 2d 808.

No. 05–8717. REVELS *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. C. A. 5th Cir. Certiorari denied.

No. 05–8719. BIQUET *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 143 Fed. Appx. 609.

No. 05–8728. AMESBURY *v.* OLSON, MARION COUNTY TAX COLLECTOR. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 919 So. 2d 458.

No. 05–8736. POST *v.* BRADSHAW, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 422 F. 3d 419.

No. 05–8738. MAKIDON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 05–8746. Brannum *v.* Lake et al. C. A. D. C. Cir. Certiorari denied.

No. 05–8749. Morris *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 05–8750. Allen *v.* District Court of Oklahoma, Pittsburg County. Ct. Crim. App. Okla. Certiorari denied.

No. 05–8751. Robinson *v.* Padula, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 142 Fed. Appx. 773.

No. 05–8757. Andrews *v.* Gonzales, Attorney General, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 123 Fed. Appx. 408.

No. 05–8767. Burnett *v.* Dosler et al. C. A. 6th Cir. Certiorari denied.

No. 05–8771. Shulman *v.* New York. Ct. App. N. Y. Certiorari denied. Reported below: 6 N. Y. 3d 1, 843 N. E. 2d 125.

No. 05–8772. Stokes *v.* Indiana. Ct. App. Ind. Certiorari denied. Reported below: 828 N. E. 2d 937.

No. 05–8775. Jones *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 912 So. 2d 973.

No. 05–8791. Luckett *v.* Folino, Superintendent, State Correctional Institution at Greene, et al. C. A. 3d Cir. Certiorari denied.

No. 05–8796. Litmon *v.* Superior Court of California, Santa Clara County. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 05–8802. Castillo *v.* Texas. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 05–8812. Barnes *v.* Coody, Assistant Warden, et al. C. A. 5th Cir. Certiorari denied.

No. 05–8814. Carter *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 36 Cal. 4th 1215, 117 P. 3d 544.

No. 05–8815. Ward *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 36 Cal. 4th 186, 114 P. 3d 717.

No. 05–8817. KING v. MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 172 S. W. 3d 856.

No. 05–8822. WRIGLEY v. TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 178 S. W. 3d 828.

No. 05–8823. THABET v. KNOWLES, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 05–8828. LODHI v. NEW YORK. County Ct., Ulster County, N. Y. Certiorari denied.

No. 05–8833. LUTZ v. FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 914 So. 2d 953.

No. 05–8836. LITTLE v. ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 945 So. 2d 1102.

No. 05–8837. THEIS v. BRADSHAW, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 05–8844. JACKSON v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES ET AL. C. A. 11th Cir. Certiorari denied.

No. 05–8845. GRISSOM v. FLOYD COUNTY POLICE DEPARTMENT ET AL. Ct. App. Ga. Certiorari denied.

No. 05–8855. DELUCA v. KATCHMERIC. Sup. Ct. Va. Certiorari denied.

No. 05–8858. CHAPMAN v. ROCHELLE ET AL. C. A. 8th Cir. Certiorari denied.

No. 05–8859. LEPISCOPO v. SOCIAL SECURITY ADMINISTRATION. C. A. 3d Cir. Certiorari denied.

No. 05–8860. ANDERSON v. SEDGWICK COUNTY, KANSAS. C. A. 10th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 754.

No. 05–8891. WAWA ET UX. v. GONZALES, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 136 Fed. Appx. 565.

No. 05–8898. DUSHAJ v. DEPARTMENT OF HOMELAND SECURITY ET AL. C. A. 6th Cir. Certiorari denied.

No. 05–8903. GRUBOR *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 860 A. 2d 1128.

No. 05–8909. HOLDEN *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 171 N. C. App. 364, 615 S. E. 2d 97.

No. 05–8928. RICHIE *v.* SIRMONS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 417 F. 3d 1117.

No. 05–8952. FARNSWORTH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 270 Va. 1, 613 S. E. 2d 459.

No. 05–8962. DENNIS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 185 N. J. 300, 885 A. 2d 429.

No. 05–8965. DOLENC *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 880 A. 2d 5.

No. 05–8990. MINH NGUYEN *v.* REGAN, HALPERIN & LONG, PLLC. C. A. 4th Cir. Certiorari denied. Reported below: 145 Fed. Appx. 837.

No. 05–8993. BAILEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 19 App. Div. 3d 302, 798 N. Y. S. 2d 406.

No. 05–8999. WYNN *v.* PROFESSIONAL STANDARDS COMMISSION ET AL. Sup. Ct. Ga. Certiorari denied.

No. 05–9006. GRAHAM *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 05–9015. MAMPUSTI *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 05–9029. ROSS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 856 A. 2d 93.

No. 05–9047. HARRIS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 914 So. 2d 953.

No. 05–9112. GARDNER *v.* FAHEY, CHAIRPERSON, VIRGINIA PAROLE BOARD, ET AL. C. A. 4th Cir. Certiorari denied.

No. 05–9115. SHOEMAKER *v.* MOORE, SUPERINTENDENT, NORTHEAST CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 05–9129. BOLTZ *v.* SIRMONS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 415 F. 3d 1215.

No. 05–9134. NELSON *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 05–9135. MCGEE *v.* MCBRIDE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 252.

No. 05–9170. LILLY *v.* SCHWARTZ ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 144 Fed. Appx. 999.

No. 05–9187. WILLIAMS *v.* ALABAMA PUBLIC HEALTH DEPARTMENT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 120.

No. 05–9314. LENTZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 05–9319. CROBARGER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 100.

No. 05–9325. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 229.

No. 05–9328. MOE *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 123 P. 3d 148.

No. 05–9329. OLIVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 405.

No. 05–9333. BROWN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 05–9336. GONZALEZ RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 686.

No. 05–9339. NICHOLS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 416 F. 3d 811.

No. 05–9340. MEGGISON, AKA EDWARDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 152 Fed. Appx. 275.

No. 05–9341. Neal *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 05–9342. Powell *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 430 F. 3d 490.

No. 05–9343. Schybal *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 434.

No. 05–9345. Ruiz *v.* Haro, Warden. C. A. 5th Cir. Certiorari denied.

No. 05–9346. Shorter *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 05–9347. Lattimore *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 552.

No. 05–9348. Le *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 154.

No. 05–9355. Todd *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 526.

No. 05–9359. Hernandez, aka Muniz *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 433 F. 3d 1328.

No. 05–9360. Oman *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 427 F. 3d 1070.

No. 05–9362. Alvarado *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 730.

No. 05–9367. Najera *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 995.

No. 05–9369. Buckner *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 155 Fed. Appx. 67.

No. 05–9370. Burks *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 287.

No. 05–9371. Agurcia Escobar *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 459.

No. 05–9373. Chaney *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 05–9374. Davis *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 670.

No. 05–9376. Farrow *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 401.

No. 05–9395. DeJesus *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 430 F. 3d 606.

No. 05–9399. Lascola *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 05–9400. Jackson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 670.

No. 05–9403. Pennywell *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 441.

No. 05–9404. McDonnell *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 678.

No. 05–9406. Singh, aka Sukhwal *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 609.

No. 05–9407. Romo *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 413 F. 3d 1044.

No. 05–9408. Reed *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 212.

No. 05–9409. Smith *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 154.

No. 05–9412. Pidcoke *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 152 Fed. Appx. 378.

No. 05–9415. Villalobos, aka Garcia *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 248.

No. 05–9421. Felton et al. *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 417 F. 3d 97.

No. 05–9422. Garza *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–9424. Flint *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 252.

No. 05–9425. Howze *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–9426. Girton *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 389.

No. 05–9427. Guerrier *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 428 F. 3d 76.

No. 05–9428. Gonzalez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 124.

No. 05–9431. Johnson *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–9432. Molina-Lopez *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 05–9433. Pirtle *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 878.

No. 05–9436. Jones *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–9437. Snipes *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 584.

No. 05–9438. Acosta-Sanchez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 152.

No. 05–9439. Diaz *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 223.

No. 05–9442. Alvarado *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 730.

No. 05–9443. Bunche *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 437.

No. 05–9444. Bringas-Murrieta *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 152 Fed. Appx. 639.

No. 05–9449. Washington *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 43.

No. 05–9450. Ries *v.* Bezy, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–9453. Moreno *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 421 F. 3d 1217.

No. 05–9454. Jackson *v.* United States District Court for the Middle District of North Carolina. C. A. 4th Cir. Certiorari denied. Reported below: 142 Fed. Appx. 791.

No. 05–9455. Taylor *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 05–9456. Wood *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 05–9459. Johnson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 640.

No. 05–9460. Love *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 3d 477.

No. 05–9462. Clamp *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 510.

No. 05–9465. Veloz-Vancampo *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 05–9466. Williams *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 254.

No. 05–9468. Snyder *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 942.

No. 05–668. Buss, Superintendent, Indiana State Prison *v.* Wisehart. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 408 F. 3d 321.

No. 05–795. Allegheny Intermediate Unit et al. *v.* Pardini et ux., Individually and on Behalf of Their Minor Child Pardini. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 420 F. 3d 181.

No. 05–919. Fidelity Federal Bank & Trust *v.* Kehoe. C. A. 11th Cir. Certiorari denied. Reported below: 421 F. 3d 1209.

Justice Scalia, with whom Justice Alito joins, concurring.

This case presents an important question of statutory construction—whether "actual damages" must be shown before a plaintiff may recover under the Driver's Privacy Protection Act of 1994, 18 U. S. C. § 2724(b)(1). The Florida Department of Highway Safety and Motor Vehicles sold to petitioner, for a penny apiece, the names and addresses of 565,600 individuals in three counties who registered cars with the DMV—the total cost was thus $5,656. Petitioner intended to mail these individuals a solicitation to refinance their automobile loans. However, because Florida—alone among the States—had not immediately amended its law to comply with the Act, none of these people had given their "express consent" to the release of this information, as the Act requires. § 2721(b)(12). Petitioner now faces a possible $1.4 billion judgment—$2,500 per violation. Because of other class actions currently pending in Florida, involving the same question, the total amount at stake may reach $40 billion. This enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari. See, *e. g.*, R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 248 (8th ed. 2002).

Nonetheless, I concur in the denial of certiorari. A second and equally important legal question is bound up in this case—namely, whether petitioner can be held liable under the Act if it did not know that the State had failed to comply with the Act's "express consent" requirement. The District Court did not reach this issue since it awarded summary judgment to petitioner on the actual damages question. The scienter question remains open in light of the Eleventh Circuit's judgment reversing and remanding the case. See 421 F. 3d 1209 (2005). Depending on the course of proceedings below, it may later be appropriate for us to consider granting certiorari as to either or both issues. But because I agree that our consideration of the case would be premature now, I concur in the denial of certiorari.

No. 05–7417. Wilkerson *v.* Klem, Superintendent, State Correctional Institution at Mahanoy, et al. C. A. 3d Cir.

Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 412 F. 3d 449.

No. 05–8718. YOUNG *v.* TENNIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 05–8732. OLIVER *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 167 Fed. Appx. 807.

No. 05–8779. MOSS *v.* FRANKLIN COUNTY DISTRICT ATTORNEY ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 05–8793. JOSEPH *v.* WEST MANHEIM POLICE DEPARTMENT ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 131 Fed. Appx. 833.

No. 05–9375. CLARK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 127 Fed. Appx. 85.

*Rehearing Denied*

No. 04–10543. DAMMERAU *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 546 U. S. 857;

No. 05–5041. ENGLAND *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 546 U. S. 1136;

No. 05–6009. FULTON *v.* UNITED STATES, 546 U. S. 1097;

No. 05–6266. HUDSON *v.* M. S. CARRIERS, INC., 546 U. S. 1018;

No. 05–6991. BROWN *v.* HOWARD ET AL., 546 U. S. 1099;

No. 05–7112. MURRAY *v.* SCOTT, 546 U. S. 1101;

No. 05–7310. RUSSELL *v.* CITY OF CHICAGO, ILLINOIS, 546 U. S. 1105;

No. 05–7344. WILLIAMS *v.* BOOKER, WARDEN, 546 U. S. 1106;

No. 05–7489. GORMAN *v.* CALIFORNIA, 546 U. S. 1140;

No. 05–7498. ODUM *v.* BUONASSISSI, 546 U. S. 1140;

No. 05–7828. MATHISON ET UX. *v.* SWENSON ET AL., 546 U. S. 1143; and

No. 05–8011. ROMAN *v.* CAMPBELL, SUPERINTENDENT, ALBANY COUNTY CORRECTIONAL FACILITY, 546 U. S. 1143. Petitions for rehearing denied.

MARCH 29, 2006

*Miscellaneous Order*

No. 05A883. KINCY *v.* LIVINGSTON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

MARCH 30, 2006

*Dismissal Under Rule 46*

No. 05–8805. DAVIS *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari dismissed under this Court's Rule 46. Reported below: 928 So. 2d 1089.

APRIL 3, 2006

*Miscellaneous Orders*

No. 05M76. MEISELMAN *v.* BYROM ET AL.; and

No. 05M77. LEMAY *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 05–259. BURLINGTON NORTHERN & SANTA FE RAILWAY CO. *v.* WHITE. C. A. 6th Cir. [Certiorari granted, 546 U. S. 1060.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Time to be divided as follows: 25 minutes for petitioner, 25 minutes for respondent, and 10 minutes for the Solicitor General.

No. 05–465. MOHAWK INDUSTRIES, INC. *v.* WILLIAMS ET AL. C. A. 11th Cir. [Certiorari granted, 546 U. S. 1075.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 05–6551. CUNNINGHAM *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. [Certiorari granted, 546 U. S. 1169.] Motion of petitioner for appointment of counsel granted. Peter Gold, Esq., of San Francisco, Cal., is appointed to serve as counsel for petitioner in this case.

No. 05–9212. LaFreniere *v.* Trustees of California State University. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 24, 2006, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 05–1143. In re Fuselier;
No. 05–9590. In re Beaird;
No. 05–9607. In re Sexton; and
No. 05–9703. In re Blackwell. Petitions for writs of habeas corpus denied.

No. 05–8988. In re Claiborne. Petition for writ of mandamus denied.

No. 05–8951. In re Israel. Petition for writ of mandamus and/or prohibition denied.

*Certiorari Granted*

No. 05–547. Lopez *v.* Gonzales, Attorney General. C. A. 8th Cir.; and
No. 05–7664. Toledo-Flores *v.* United States. C. A. 5th Cir. Motion of petitioner in No. 05–7664 for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: No. 05–547, 417 F. 3d 934; No. 05–7664, 149 Fed. Appx. 241.

*Certiorari Denied*

No. 05–671. Texas Department of Public Safety *v.* Espinoza et al. C. A. 5th Cir. Certiorari denied. Reported below: 148 Fed. Appx. 224.

No. 05–680. Re et al. *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 419 F. 3d 582.

No. 05–932. Lyrick Studios, Inc. *v.* Big Idea Productions, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 420 F. 3d 388.

No. 05–936. Leavitt, Secretary of Health and Human Services *v.* Baystate Health Systems, dba Bay State Medical Center, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 414 F. 3d 7.

No. 05–946. Geschke, Individually and as Executor of the Estate of Geschke *v.* Air Force Assn. et al. C. A. 7th Cir. Certiorari denied. Reported below: 425 F. 3d 337.

No. 05–950. Nystrom *v.* Trex Co., Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 424 F. 3d 1136.

No. 05–957. Leonichev et ux. *v.* Valley Presbyterian Hospital. C. A. 9th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 595.

No. 05–960. Staley *v.* Staley. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 167 S. W. 3d 145.

No. 05–972. Emmanuel *v.* International Brotherhood of Teamsters, Local Union No. 25. C. A. 1st Cir. Certiorari denied. Reported below: 426 F. 3d 416.

No. 05–993. Davis *v.* City of Tucson, Arizona. C. A. 9th Cir. Certiorari denied.

No. 05–995. Fei Jiang *v.* Gonzales, Attorney General. C. A. 2d Cir. Certiorari denied. Reported below: 153 Fed. Appx. 796.

No. 05–999. Collins et al. *v.* Ainsworth et al. C. A. 5th Cir. Certiorari denied. Reported below: 177 Fed. Appx. 377.

No. 05–1004. Sebastian *v.* Gonzales, Attorney General. C. A. 11th Cir. Certiorari denied. Reported below: 409 F. 3d 1280.

No. 05–1016. Edwards, Trustee, et al. *v.* Irvine Co. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 05–1043. Robin Singh Educational Services, Inc., dba TestMasters, et al. *v.* Test Masters Educational Services, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 3d 559.

No. 05–1077. Nelson, Individually and as Personal Representative of the Estate of Nelson, Deceased *v.* Office of Personnel Management. C. A. 9th Cir. Certiorari denied. Reported below: 148 Fed. Appx. 617.

No. 05–1081. Webb et al. *v.* City of Dallas, Texas, et al. C. A. 5th Cir. Certiorari denied. Reported below: 145 Fed. Appx. 903.

No. 05–1112. JENSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 425 F. 3d 698.

No. 05–7521. KAPPELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 418 F. 3d 550.

No. 05–8045. HARJUSI *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 05–8330. YOUNG *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 05–8350. BAHENA-CARDENAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 411 F. 3d 1067.

No. 05–8370. OSUNA-ZEPEDA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 416 F. 3d 838.

No. 05–8394. TURNER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 924 So. 2d 737.

No. 05–8412. LACKEY *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 280 Kan. 190, 120 P. 3d 332.

No. 05–8873. SAMSON *v.* LONG, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 592.

No. 05–8874. SCOTT *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 05–8878. CHAVEZ *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 05–8882. JOST *v.* LOCKYER, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 127 Fed. Appx. 358.

No. 05–8884. BRUCE *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 911 So. 2d 1246.

No. 05–8893. VAUGHN *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 140 Fed. Appx. 638.

No. 05–8897. Marquez De La Plata *v.* Revell et al. C. A. 5th Cir. Certiorari denied. Reported below: 142 Fed. Appx. 218.

No. 05–8906. Hirsch *v.* Supreme Court of New Hampshire. Sup. Ct. N. H. Certiorari denied. Reported below: 152 N. H. 523, 880 A. 2d 439.

No. 05–8913. Flippo *v.* McBride, Warden. Cir. Ct. Fayette County, W. Va. Certiorari denied.

No. 05–8915. Gilbert *v.* Bay Area Rapid Transit District et al. C. A. 9th Cir. Certiorari denied. Reported below: 142 Fed. Appx. 964.

No. 05–8917. Peters *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 05–8921. Lyons *v.* Whorton, Director, Nevada Department of Corrections, et al. C. A. 9th Cir. Certiorari denied.

No. 05–8935. Clay *v.* Arkansas. Sup. Ct. Ark. Certiorari denied.

No. 05–8939. Buffington-Bennett *v.* Texas. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 05–8940. Bridgeforth *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 05–8941. Bloomingburg *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 346 Ill. App. 3d 308, 804 N. E. 2d 638.

No. 05–8950. Hurst *v.* Wilkins. C. A. 4th Cir. Certiorari denied. Reported below: 140 Fed. Appx. 470.

No. 05–8953. Hogan *v.* McBride, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 143 Fed. Appx. 546.

No. 05–8958. Walters *v.* Jones, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–8959. Wygnanski *v.* Nevada et al. C. A. 9th Cir. Certiorari denied.

No. 05–8960. Way *v.* McDonough, Interim Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 05–8963. Dey *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 05–8973. Riggins *v.* Texas. C. A. 5th Cir. Certiorari denied.

No. 05–8977. Showalter *v.* Braxton, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 145 Fed. Appx. 441.

No. 05–8978. Teixeira *v.* Texas (two judgments). Ct. Crim. App. Tex. Certiorari denied.

No. 05–8979. Watson *v.* Miller, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 712.

No. 05–8981. Carter *v.* Gundy, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–8984. Randolph *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 582 Pa. 576, 873 A. 2d 1277.

No. 05–8985. Santillan *v.* Roper, Superintendent, Potosi Correctional Center. C. A. 8th Cir. Certiorari denied.

No. 05–8987. Corbin *v.* Pickron. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 915 So. 2d 1199.

No. 05–8989. Scott *v.* Western Correctional Institution. C. A. 4th Cir. Certiorari denied. Reported below: 144 Fed. Appx. 339.

No. 05–8998. Bentley *v.* McKee, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–9009. Graziano *v.* New York. Sup. Ct. N. Y., Kings County. Certiorari denied.

No. 05–9031. Medina *v.* Massachusetts. App. Ct. Mass. Certiorari denied. Reported below: 64 Mass. App. 1107, 833 N. E. 2d 693.

No. 05–9034. Aguilar *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: 827 N. E. 2d 31.

No. 05–9044. Heyza *v.* White, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–9057. Inthavong *v.* Evans, Acting Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 420 F. 3d 1055.

No. 05–9071. Johnson *v.* Terry, Warden. Super. Ct. Butts County, Ga. Certiorari denied.

No. 05–9086. Bond *v.* McDonough, Interim Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 447.

No. 05–9114. Grayer *v.* McKee, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 435.

No. 05–9118. Riley *v.* Kentucky Cabinet for Families and Children. Ct. App. Ky. Certiorari denied.

No. 05–9149. Sims *v.* Indiana. Ct. App. Ind. Certiorari denied.

No. 05–9163. Phillips *v.* Missouri. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 178 S. W. 3d 679.

No. 05–9199. Walker *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 913 So. 2d 606.

No. 05–9218. D. A. D. *v.* Florida Department of Children and Families. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 903 So. 2d 1034.

No. 05–9255. Camp *v.* South Dakota Board of Pardons and Paroles et al. C. A. 8th Cir. Certiorari denied.

No. 05–9354. Smart *v.* Department of the Army. C. A. Fed. Cir. Certiorari denied. Reported below: 157 Fed. Appx. 260.

No. 05–9478. Martin *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 3d 846.

No. 05–9481. Verduzco-Padilla *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 982.

No. 05–9484. Ceja-Garcia *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 139 Fed. Appx. 887.

No. 05–9486. Lloyd *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 145 Fed. Appx. 676.

No. 05–9487. Jose et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 425 F. 3d 1237.

No. 05–9489. Murphy *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 05–9494. Caldwell *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 431 F. 3d 795.

No. 05–9499. Lindo *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 430 F. 3d 518.

No. 05–9506. Bautista-Ramos *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 959.

No. 05–9508. Boggs *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 05–9509. Nash *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 683.

No. 05–9510. Miller *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 281.

No. 05–9511. Mackie *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 157 Fed. Appx. 378.

No. 05–9512. Kiles *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 136 Fed. Appx. 62.

No. 05–9514. Pickard *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 507.

No. 05–9515. Scott *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 794.

No. 05–9517. Cashaw *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 05–9522. Moxley *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 141 Fed. Appx. 226.

No. 05–9523. MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–9527. AROCHO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–9532. MERCADO-ESPINOZA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 910.

No. 05–9534. COX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 654.

No. 05–9535. ESTELAN, AKA WILKERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 185.

No. 05–9546. JUAREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 05–9547. LOPEZ-SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 05–9550. VALLADARES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 884.

No. 05–9551. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 238.

No. 05–9553. SAPP *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 161.

No. 05–9557. BACON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 666.

No. 05–9560. HILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 140 Fed. Appx. 577.

No. 05–9563. FILOCOMO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 05–9567. HINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 433 F. 3d 378.

No. 05–9570. CHILD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 372.

No. 05–9571. CASAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 425 F. 3d 23.

No. 05–9585. MONTEJANO-QUINTANAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 949.

No. 05–9589. BOWIE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 667.

No. 05–9600. GARCIA-ARELLANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 148 Fed. Appx. 244.

No. 05–533. PADILLA *v.* HANFT, UNITED STATES NAVY COMMANDER, CONSOLIDATED NAVAL BRIG. C. A. 4th Cir. Certiorari denied. JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would grant the petition for writ of certiorari. Reported below: 423 F. 3d 386.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE STEVENS join, concurring.

The Court's decision to deny the petition for writ of certiorari is, in my view, a proper exercise of its discretion in light of the circumstances of the case. The history of petitioner Jose Padilla's detention, however, does require this brief explanatory statement.

Padilla is a United States citizen. Acting pursuant to a material witness warrant issued by the United States District Court for the Southern District of New York, federal agents apprehended Padilla at Chicago's O'Hare International Airport on May 8, 2002. He was transported to New York, and on May 22 he moved to vacate the warrant. On June 9, while that motion was pending, the President issued an order to the Secretary of Defense designating Padilla an enemy combatant and ordering his military detention. The District Court, notified of this action by the Government's *ex parte* motion, vacated the material witness warrant.

Padilla was taken to the Consolidated Naval Brig in Charleston, South Carolina. On June 11, Padilla's counsel filed a habeas corpus petition in the Southern District of New York challenging the military detention. The District Court denied the petition, but the Court of Appeals for the Second Circuit reversed and ordered the issuance of a writ directing Padilla's release. This Court granted certiorari and ordered dismissal of the habeas corpus petition without prejudice, holding that the District Court for the Southern District of New York was not the appropriate court to consider it. See *Rumsfeld* v. *Padilla*, 542 U. S. 426 (2004).

The present case arises from Padilla's subsequent habeas corpus petition, filed in the United States District Court for the District of South Carolina on July 2, 2004. Padilla requested that he be released immediately or else charged with a crime. The District Court granted the petition on February 28, 2005, but the Court of Appeals for the Fourth Circuit reversed that judgment on September 9, 2005. Padilla then filed the instant petition for writ of certiorari.

After Padilla sought certiorari in this Court, the Government obtained an indictment charging him with various federal crimes. The President ordered that Padilla be released from military custody and transferred to the control of the Attorney General to face criminal charges. The Government filed a motion for approval of Padilla's transfer in the Court of Appeals for the Fourth Circuit. The Court of Appeals denied the motion, but this Court granted the Government's subsequent application respecting the transfer. *Hanft* v. *Padilla,* 546 U. S. 1084 (2006). The Government also filed a brief in opposition to certiorari, arguing, among other things, that Padilla's petition should be denied as moot.

The Government's mootness argument is based on the premise that Padilla, now having been charged with crimes and released from military custody, has received the principal relief he sought. Padilla responds that his case was not mooted by the Government's voluntary actions because there remains a possibility that he will be redesignated and redetained as an enemy combatant.

Whatever the ultimate merits of the parties' mootness arguments, there are strong prudential considerations disfavoring the exercise of the Court's certiorari power. Even if the Court were to rule in Padilla's favor, his present custody status would be unaffected. Padilla is scheduled to be tried on criminal charges. Any consideration of what rights he might be able to assert if he were returned to military custody would be hypothetical, and to no effect, at this stage of the proceedings.

In light of the previous changes in his custody status and the fact that nearly four years have passed since he first was detained, Padilla, it must be acknowledged, has a continuing concern that his status might be altered again. That concern, however, can be addressed if the necessity arises. Padilla is now being held pursuant to the control and supervision of the United States District Court for the Southern District of Florida, pending trial of the criminal case. In the course of its supervision over Padilla's custody and trial the District Court will be obliged to afford him the protection, including the right to a speedy trial, guaranteed to all federal criminal defendants. See, *e. g.*, U. S. Const., Amdt. 6; 18 U. S. C. § 3161. Were the Government to seek to change the status or conditions of Padilla's custody, that court would be in a position to rule quickly on any responsive filings submitted by Padilla. In such an event, the District Court, as well as other courts of competent jurisdiction, should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised. Padilla, moreover, retains the option of seeking a writ of habeas corpus in this Court. See this Court's Rule 20; 28 U. S. C. §§ 1651(a), 2241.

That Padilla's claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts, also counsels against addressing those claims when the course of legal proceedings has made them, at least for now, hypothetical. This is especially true given that Padilla's current custody is part of the relief he sought, and that its lawfulness is uncontested.

These are the reasons for my vote to deny certiorari.

JUSTICE GINSBURG, dissenting.

This case, here for the second time, raises a question "of profound importance to the Nation," *Rumsfeld* v. *Padilla*, 542 U. S. 426, 455 (2004) (STEVENS, J., dissenting): Does the President have authority to imprison indefinitely a United States citizen arrested on United States soil distant from a zone of combat, based on an executive declaration that the citizen was, at the time of his arrest, an "enemy combatant"? It is a question the Court heard, and should have decided, two years ago. *Ibid.* Nothing the Government has yet done purports to retract the assertion of executive power Padilla protests.

Although the Government has recently lodged charges against Padilla in a civilian court, nothing prevents the Executive from returning to the road it earlier constructed and defended. A party's voluntary cessation does not make a case less capable of repetition or less evasive of review. See *Spencer* v. *Kemna*, 523 U. S. 1, 17 (1998) (the capable-of-repetition exception to mootness applies where "(1) the challenged action [is] in its duration too short to be fully litigated prior to *cessation* or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again" (emphasis added; internal quotation marks omitted)); cf. *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U. S. 199, 203 (1968) (party whose actions threaten to moot a case must make "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur"); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632–633 (1953) (voluntary cessation of illegal activity will not render case moot unless there is "no reasonable expectation that the wrong will be repeated" (internal quotation marks omitted)). See also *Lane* v. *Williams*, 455 U. S. 624, 633–634 (1982) (applying "capable of repetition, yet evading review" in a habeas case (internal quotation marks omitted)). Satisfied that this case is not moot, I would grant the petition for certiorari.

No. 05–933. EL PASO PROPERTIES, INC., FKA EL PASO GOLD MINES, INC. *v.* SIERRA CLUB ET AL. C. A. 10th Cir. Motion of Northwest Mining Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 421 F. 3d 1133.

No. 05–8914. HARRIS *v.* CALIFORNIA. Sup. Ct. Cal. Motion of Friends of Maurice Harris for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 37 Cal. 4th 310, 118 P. 3d 545.

No. 05–9507. ARONOWITZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 151 Fed. Appx. 193.

No. 05–9529. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 05–9543. RODRIGUEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 151 Fed. Appx. 182.

*Rehearing Denied*

No. 05–651. FOX *v.* FLORIDA ET AL., 546 U. S. 1150;

No. 05–7868. ISOM *v.* UNITED STATES, 546 U. S. 1124;

No. 05–8000. Bailey *v.* Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 546 U. S. 1183;

No. 05–8030. Wilson *v.* United States, 546 U. S. 1128;

No. 05–8037. Chavez-Quiroz *v.* United States, 546 U. S. 1128; and

No. 05–8472. In re Andrews, 546 U. S. 1169. Petitions for rehearing denied.

## April 4, 2006

### *Dismissal Under Rule 46*

No. 05–9616. Salazar *v.* United States. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 157 Fed. Appx. 190.

## April 6, 2006

### *Dismissal Under Rule 46*

No. 05–9586. Liner *v.* United States. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 435 F. 3d 920.

## April 12, 2006

*Miscellaneous Orders.* (For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see *post,* p. 1223; amendments to the Federal Rules of Bankruptcy Procedure, see *post,* p. 1229; amendments to the Federal Rules of Civil Procedure, see *post,* p. 1235; amendments to the Federal Rules of Criminal Procedure, see *post,* p. 1271; and amendments to the Federal Rules of Evidence, see *post,* p. 1283.)

## April 14, 2006

### *Miscellaneous Orders*

No. 05–200. Empire HealthChoice Assurance, Inc., dba Empire Blue Cross Blue Shield *v.* McVeigh, as Administratrix of the Estate of McVeigh. C. A. 2d Cir. [Certiorari granted, 546 U. S. 1085.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Julia Cruz, as representative of Jose S. Cruz, for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 05–502. Brigham City, Utah *v.* Stuart et al. Sup. Ct. Utah. [Certiorari granted, 546 U. S. 1085.] Motion of the National Association of Criminal Defense Lawyers for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 05–8794. Hill *v.* McDonough, Interim Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. [Certiorari granted *sub nom. Hill* v. *Crosby, Secretary, Florida Department of Corrections, et al.*, 546 U. S. 1158.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

April 17, 2006

*Certiorari Granted—Vacated and Remanded.* (See also No. 05–552, *ante,* p. 183.)

No. 05–777. United States *v.* Nebraska Department of Health and Human Services Finance and Support et al. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Georgia,* 546 U. S. 151 (2006). Reported below: 408 F. 3d 1096.

*Miscellaneous Orders*

No. 05A877. Londo *v.* Norwest Bank/Option Mortgage. Cir. Ct. Cook County, Ill., Chancery Div. Application for stay, addressed to Justice Alito and referred to the Court, denied.

No. 05M78. Davis *v.* Norris, Director, Arizona Department of Correction; and

No. 05M79. Vance *v.* Illinois. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 05–85. Powerex Corp., dba Powerex Energy Corp. *v.* Reliant Energy Sources, Inc., et al. C. A. 9th Cir.; and

No. 05–584. Powerex Corp., dba Powerex Energy Corp. *v.* California ex rel. Lockyer, Attorney General of California. C. A. 9th Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 05–7058. Jones *v.* Bock, Warden, et al.; and

No. 05–7142. Williams *v.* Overton et al.; and Walton *v.* Bouchard et al. C. A. 6th Cir. [Certiorari granted, *ante,*

p. 1002.] Motions of petitioners for appointment of counsel granted. Jean-Claude Andre, Esq., of Los Angeles, Cal., is appointed to serve as counsel for petitioners in these cases.

No. 05–8580. BOWEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [546 U. S. 1167] denied.

No. 05–9278. MODY *v.* MODY. Dist. Ct. App. Fla., 5th Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 8, 2006, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 05–1181. IN RE FUSELIER;
No. 05–9420. IN RE FERGUSON; and
No. 05–9790. IN RE SMITH. Petitions for writs of habeas corpus denied.

No. 05–10049. IN RE ANDERSON. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 05–1057. IN RE OLSON;
No. 05–9038. IN RE VOVAK;
No. 05–9041. IN RE GARRY;
No. 05–9049. IN RE HOWARD;
No. 05–9056. IN RE HOGAN;
No. 05–9075. IN RE JACKSON;
No. 05–9228. IN RE BROWN-EL;
No. 05–9827. IN RE DRABOVSKIY; and
No. 05–9902. IN RE OSAMOR. Petitions for writs of mandamus denied.

No. 05–9324. IN RE KORNAFEL. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

### *Certiorari Granted*

No. 05–669. BP AMERICA PRODUCTION CO., SUCCESSOR IN INTEREST TO AMOCO PRODUCTION CO., ET AL. *v.* WATSON, ASSISTANT SECRETARY, LAND AND MINERALS MANAGEMENT, DEPARTMENT OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari granted limited to Question 2 presented by the petition. THE CHIEF JUSTICE and JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 410 F. 3d 722.

No. 05–785. CAREY, WARDEN *v.* MUSLADIN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 427 F. 3d 653.

No. 05–998. UNITED STATES *v.* RESENDIZ-PONCE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 425 F. 3d 729.

*Certiorari Denied*

No. 05–712. FORT JAMES CORP. *v.* SOLO CUP CO. C. A. Fed. Cir. Certiorari denied. Reported below: 412 F. 3d 1340.

No. 05–743. SCHNEIDER ET AL. *v.* KISSINGER ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 412 F. 3d 190.

No. 05–793. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 140 Fed. Appx. 170.

No. 05–850. ESTES *v.* CARPENTER CO. ET AL. Ct. App. Ky. Certiorari denied.

No. 05–877. JERONIMO-BAUTISTA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 425 F. 3d 1266.

No. 05–961. IZUMI PRODUCTS CO. *v.* KONINKLIJKE PHILIPS ELECTRONICS N. V. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 140 Fed. Appx. 236.

No. 05–964. HENSS *v.* IOWA ACCOUNTANCY EXAMINING BOARD. Ct. App. Iowa. Certiorari denied. Reported below: 705 N. W. 2d 106.

No. 05–967. M2 SOFTWARE, INC. *v.* MADACY ENTERTAINMENT ET AL.; and M2 SOFTWARE, INC. *v.* M2 COMMUNICATIONS, L. L. C., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 421 F. 3d 1073 (first judgment); 149 Fed. Appx. 612 (second judgment).

No. 05–980. FALWELL ET AL. *v.* LAMPARELLO. C. A. 4th Cir. Certiorari denied. Reported below: 420 F. 3d 309.

No. 05–985. TITTLE *v.* BOTTORFF-TITTLE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 131 Fed. Appx. 554.

No. 05–987. LAWRENCE *v.* ANTONUCCI ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 144 Fed. Appx. 193.

No. 05–992. ENRICK *v.* KORCZAK, ADMINISTRATOR OF THE ESTATES OF KORCZAK ET AL., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 427 F. 3d 419.

No. 05–994. LAWRENCE *v.* WESTINGHOUSE SAVANNAH RIVER CO. LLC. C. A. 4th Cir. Certiorari denied. Reported below: 141 Fed. Appx. 191.

No. 05–997. BEUSTRING *v.* OKLAHOMA BAR ASSN. C. A. 10th Cir. Certiorari denied. Reported below: 143 Fed. Appx. 997.

No. 05–1002. SHAW *v.* SAN DIEGO COUNTY, CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 05–1003. ROMERO-RODRIGUEZ ET AL. *v.* GONZALES, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 131 Fed. Appx. 203.

No. 05–1007. LOPEZ *v.* CARR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 12.

No. 05–1009. HUDSON *v.* IMAGINE ENTERTAINMENT CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 128 Fed. Appx. 178.

No. 05–1011. INTERA CORP. ET AL. *v.* HENDERSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 428 F. 3d 605.

No. 05–1012. HOLST *v.* CITY OF PORTLAND, OREGON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 152 Fed. Appx. 588.

No. 05–1014. RADJABI-MOUGADAM ET AL. *v.* RADJABI-MOUGADAM. Ct. Civ. App. Ala. Certiorari denied. Reported below: 945 So. 2d 494.

No. 05–1015. AMAYA *v.* PITNER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 130 Fed. Appx. 25.

No. 05–1017. Roman Catholic Archbishop of Los Angeles *v.* Superior Court of California, Los Angeles County, et al.; and

No. 05–1039. Doe et al. *v.* Superior Court of California, Los Angeles County, et al. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 131 Cal. App. 4th 417, 32 Cal. Rptr. 3d 209.

No. 05–1020. Pekrul *v.* Barnhart, Commissioner of Social Security. C. A. 5th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 329.

No. 05–1021. Puerto Rico Telephone Co., Inc. *v.* U. S. Phone Manufacturing Corp. C. A. 1st Cir. Certiorari denied. Reported below: 427 F. 3d 21.

No. 05–1028. Fletcher *v.* United States District Court for the Western District of Missouri. C. A. 8th Cir. Certiorari denied. Reported below: 424 F. 3d 783.

No. 05–1034. Caruso *v.* Oregon. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 3d 848.

No. 05–1035. Oakland City University, Founded by General Baptists, Inc., dba Oakland City University *v.* United States ex rel. Main. C. A. 7th Cir. Certiorari denied. Reported below: 426 F. 3d 914.

No. 05–1048. Haiying Xi *v.* Bryn Mawr College et al. Super. Ct. Pa. Certiorari denied. Reported below: 869 A. 2d 26.

No. 05–1052. Gehner *v.* City of Las Vegas, Nevada. Sup. Ct. Nev. Certiorari denied. Reported below: 121 Nev. 899, 124 P. 3d 203.

No. 05–1055. Smith *v.* Mullarkey, Chief Justice, Supreme Court of Colorado, et al. Sup. Ct. Colo. Certiorari denied. Reported below: 121 P. 3d 890.

No. 05–1060. Riley et al. *v.* Blagojevich, Governor of Illinois, et al. C. A. 7th Cir. Certiorari denied. Reported below: 425 F. 3d 357.

No. 05–1103. Patterson *v.* Department of the Interior. C. A. Fed. Cir. Certiorari denied. Reported below: 424 F. 3d 1151.

No. 05–1123. WEINSTOCK *v.* GRIEVANCE COMMITTEE FOR THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 155 Fed. Appx. 553.

No. 05–1130. INOVA DIAGNOSTICS, INC. *v.* STRAYHORN, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS, ET AL. Ct. App. Tex., 3d Dist. Certiorari denied. Reported below: 166 S. W. 3d 394.

No. 05–1146. DEMARTINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 154 Fed. Appx. 220.

No. 05–1155. BEAN *v.* VIRGINIA STATE BAR. Sup. Ct. Va. Certiorari denied.

No. 05–1158. HOUSE *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 62 M. J. 389.

No. 05–1175. ANWAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 428 F. 3d 1102.

No. 05–1176. BASHIR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 898.

No. 05–6922. NAVA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 05–7954. SARTIN *v.* WEST VIRGINIA. Cir. Ct. Wayne County, W. Va. Certiorari denied.

No. 05–7980. VINSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 147 Fed. Appx. 763.

No. 05–8090. GOLDSBY *v.* BELLEQUE, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 142 Fed. Appx. 303.

No. 05–8138. HUDSON, AKA SPICER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 414 F. 3d 931.

No. 05–8221. ZHENG *v.* GEORGIA. Ct. App. Ga. Certiorari denied.

No. 05–8337. MEZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 143 Fed. Appx. 626.

No. 05–8342. LOPEZ *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 912 So. 2d 1228.

No. 05–8435. VEGA-RICO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 417 F. 3d 946.

No. 05–8555. RICHARDSON *v.* BUSS, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied.

No. 05–8577. BATES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 424 F. 3d 992.

No. 05–8664. MCNAIR *v.* ALLEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 416 F. 3d 1291.

No. 05–8672. SAMUELS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 36 Cal. 4th 96, 113 P. 3d 1125.

No. 05–8680. LEAL *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 3d 543.

No. 05–8744. BOWEN *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 280 Kan. xxiii, 121 P. 3d 457.

No. 05–8904. FLEMING *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 280 Kan. xxiii, 121 P. 3d 457.

No. 05–9012. SUDDUTH, AKA MUHAMMAD *v.* CITY OF PITTSBURGH COMMISSION ON HUMAN RELATIONS ET AL.; SUDDUTH, AKA MUHAMMAD *v.* CITY OF PITTSBURGH COMMISSION ON HUMAN RELATIONS ET AL.; SUDDUTH, AKA MUHAMMAD *v.* CITY OF PITTSBURGH COMMISSION ON HUMAN RELATIONS ET AL.; SUDDUTH, AKA MUHAMMAD *v.* MCCLENAHAN ET AL.; and SUDDUTH, AKA MUHAMMAD *v.* HOUSING AUTHORITY OF THE CITY OF PITTSBURGH ET AL. Commw. Ct. Pa. Certiorari denied.

No. 05–9017. CAMPBELL *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 359 N. C. 644, 617 S. E. 2d 1.

No. 05–9019. COOPER *v.* WHORTON, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 05–9020. CLEVELAND *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 177 S. W. 3d 374.

No. 05–9025. TYLER *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 416 F. 3d 500.

No. 05–9026. PERAZA SALAZAR *v.* GALAZA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–9032. ABNEY *v.* RYAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–9035. BOYCE *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 05–9037. STATON *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–9040. PHILLIPS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 05–9042. HAMILTON *v.* RANGER ENTERPRISES. C. A. 10th Cir. Certiorari denied. Reported below: 144 Fed. Appx. 753.

No. 05–9048. HAWKINS *v.* L. S. I., INC., ET AL. C. A. 6th Cir. Certiorari denied.

No. 05–9052. CORBETT *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 05–9060. HENLEY *v.* CASON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 445.

No. 05–9065. SCHIPKE *v.* STOLC, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 05–9069. NOWDEN *v.* ADAMS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 05–9073. JORDAN *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 05–9077. WASHINGTON *v.* HILL, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 3d 864.

No. 05–9078. VELISHKA *v.* T. N. T. HOME BUILDERS ET AL. Sup. Jud. Ct. Me. Certiorari denied.

No. 05–9092. ALLEN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 05–9093. ARNOLD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 349 Ill. App. 3d 668, 812 N. E. 2d 696.

No. 05–9094. BOGER *v.* PRINCE WILLIAM COUNTY POLICE DEPARTMENT. Sup. Ct. Va. Certiorari denied.

No. 05–9101. HEIDARI *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 125 Wash. App. 1009.

No. 05–9102. GIDDINGS *v.* KLEM, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MAHANOY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 05–9104. HARPER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 05–9106. MITCHELL *v.* HARRY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 05–9107. PAGEL *v.* WASHINGTON MUTUAL BANK, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 498.

No. 05–9108. YOUNG *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 05–9109. TAYLOR *v.* TAYLOR, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–9110. THOMAS *v.* RAY, WARDEN. Sup. Ct. Va. Certiorari denied.

No. 05–9117. SIPE *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 05–9120. SANDERS *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 403.

No. 05–9121. SCANLON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 05–9124. Logan *v.* Liberty Healthcare Corp., dba Arkansas Partnership Program. C. A. 8th Cir. Certiorari denied. Reported below: 416 F. 3d 877.

No. 05–9128. Drewery *v.* Texas. Ct. App. Tex., 8th Dist. Certiorari denied.

No. 05–9138. Mertens *v.* City of Seattle, Washington, et al. C. A. 9th Cir. Certiorari denied.

No. 05–9141. Secress *v.* Ullman et al. C. A. 9th Cir. Certiorari denied. Reported below: 147 Fed. Appx. 636.

No. 05–9144. VanBuskirk *v.* Oregon. Sup. Ct. Ore. Certiorari denied.

No. 05–9145. Warren *v.* Washington. Sup. Ct. Wash. Certiorari denied.

No. 05–9146. Kennedy *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 36 Cal. 4th 595, 115 P. 3d 472.

No. 05–9148. Reid *v.* Johnson, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 133 Fed. Appx. 889.

No. 05–9151. Vishevnik *v.* Board of Education of the City of New York. C. A. 2d Cir. Certiorari denied. Reported below: 145 Fed. Appx. 708.

No. 05–9152. Treiber *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 582 Pa. 646, 874 A. 2d 26.

No. 05–9153. Young *v.* Gates. C. A. 6th Cir. Certiorari denied.

No. 05–9156. Anderson *v.* Kalitz. C. A. 3d Cir. Certiorari denied.

No. 05–9158. Al-Bayyinah *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 359 N. C. 741, 616 S. E. 2d 500.

No. 05–9159. Dung Tri Nguyen *v.* California. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 05–9166. Scott *v.* Romero, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 495.

No. 05–9168. Pinckney *v.* McMaster, Attorney General of South Carolina. C. A. 4th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 440.

No. 05–9172. Payne *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied.

No. 05–9174. Elrod *v.* Saunders. Ct. App. Mich. Certiorari denied.

No. 05–9175. Cortez *v.* Shaw, Warden. C. A. 7th Cir. Certiorari denied.

No. 05–9177. Dumas *v.* United States Parole Commission et al. C. A. 8th Cir. Certiorari denied.

No. 05–9186. Stopher *v.* Conliffe, Judge, Circuit Court of Kentucky, Jefferson County, et al. Sup. Ct. Ky. Certiorari denied. Reported below: 170 S. W. 3d 307.

No. 05–9189. Michalski *v.* New York. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 15 App. Div. 3d 918, 788 N. Y. S. 2d 776.

No. 05–9192. Norbert *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 05–9197. Johnson *v.* Grace, Superintendent, State Correctional Institution at Huntingdon, et al. C. A. 3d Cir. Certiorari denied.

No. 05–9202. Johnson *v.* Kentucky. Ct. App. Ky. Certiorari denied.

No. 05–9205. Bomer *v.* Sharp et al. C. A. 6th Cir. Certiorari denied.

No. 05–9210. Jaffe *v.* St. Luke Medical Center et al. C. A. 9th Cir. Certiorari denied.

No. 05–9211. Gibbs *v.* Barnhart, Commissioner of Social Security. C. A. 11th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 243.

No. 05–9213. WILLIAMS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 912 So. 2d 320.

No. 05–9214. THOMAS *v.* BUTLER ET AL. C. A. 4th Cir. Certiorari denied.

No. 05–9221. MYERS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 130 P. 3d 262.

No. 05–9223. BROWN *v.* GONZALES, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 155 Fed. Appx. 612.

No. 05–9225. PERRY *v.* CLARK COUNTY CHILD PROTECTIVE SERVICES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 140 Fed. Appx. 751.

No. 05–9229. BROWN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 05–9232. ZAGRE *v.* DEPARTMENT OF HOMELAND SECURITY. C. A. 2d Cir. Certiorari denied. Reported below: 145 Fed. Appx. 388.

No. 05–9238. GARCIA *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 05–9241. HOOKS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 126 P. 3d 636.

No. 05–9243. HALL *v.* LUMBERMEN'S MUTUAL CASUALTY CO. C. A. 6th Cir. Certiorari denied. Reported below: 142 Fed. Appx. 875.

No. 05–9244. HOLLAND *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 916 So. 2d 750.

No. 05–9246. HILL *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 360 N. C. 71, 623 S. E. 2d 778.

No. 05–9248. BEA *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 05–9252. SABBIA *v.* LOMBARDI. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 357 Ill. App. 3d 1085, 895 N. E. 2d 694.

No. 05–9257. Coleman *v.* Wells et al. Sup. Ct. Mo. Certiorari denied.

No. 05–9258. Cockrell *v.* United States District Court for the Central District of California. C. A. 9th Cir. Certiorari denied.

No. 05–9260. Frazier *v.* Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 145 Fed. Appx. 866.

No. 05–9261. Earl X. *v.* Howton, Superintendent, Oregon State Correctional Institution. C. A. 9th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 1.

No. 05–9262. Turner-El *v.* Unknown Assignment Committee et al. C. A. 7th Cir. Certiorari denied.

No. 05–9265. Mason *v.* Barnhart, Commissioner of Social Security. C. A. 6th Cir. Certiorari denied.

No. 05–9268. Mettetal *v.* Vanderbilt University et al. C. A. 6th Cir. Certiorari denied. Reported below: 147 Fed. Appx. 577.

No. 05–9271. Mendez *v.* Giurbino, Warden. C. A. 9th Cir. Certiorari denied.

No. 05–9272. Butler *v.* Hutson et al. C. A. 11th Cir. Certiorari denied. Reported below: 147 Fed. Appx. 62.

No. 05–9275. Williams *v.* Werholtz, Secretary, Kansas Department of Corrections, et al. C. A. 10th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 644.

No. 05–9276. Thurston *v.* United States Judiciary. C. A. D. C. Cir. Certiorari denied.

No. 05–9282. Culbreath *v.* Lafler, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–9284. Wright *v.* Mosley, Warden. C. A. 11th Cir. Certiorari denied.

No. 05–9296. Grass *v.* Gonzales, Attorney General. C. A. 8th Cir. Certiorari denied. Reported below: 418 F. 3d 876.

No. 05–9299. FULLER *v.* CAMUS, DBA UNITED STATES MARSHALS SERVICE, PREMIER TRENDS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 139 Fed. Appx. 554.

No. 05–9305. DERBYSHIRE *v.* HOFBAUER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 05–9310. WILSON *v.* GODDARD, ATTORNEY GENERAL OF ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 05–9318. CALLOWAY *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 914 So. 2d 12.

No. 05–9322. YOUNG *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 873 A. 2d 773.

No. 05–9331. ARICHABALA *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 922 So. 2d 199.

No. 05–9363. CARR *v.* KRAUSE. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 05–9365. DIXON *v.* SOCIAL SECURITY ADMINISTRATION. C. A. 8th Cir. Certiorari denied.

No. 05–9368. MUNOZ-PADILLA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 357 Ill. App. 3d 1088, 895 N. E. 2d 696.

No. 05–9382. TAYLOR *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 4th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 646.

No. 05–9383. WIGGINTON ET UX. *v.* STORAGE USA. C. A. 9th Cir. Certiorari denied. Reported below: 127 Fed. Appx. 359.

No. 05–9389. COSTA *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 05–9390. DOBY *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 05–9392. DINGLE *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 142 Fed. Appx. 163.

No. 05–9401. Jefferson *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 05–9402. Jones *v.* Johnston. C. A. 5th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 336.

No. 05–9413. Ward *v.* Wachovia Bank, N. A. Ct. App. N. C. Certiorari denied. Reported below: 174 N. C. App. 368, 620 S. E. 2d 734.

No. 05–9414. Tressler *v.* McDonough, Interim Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 05–9416. Williams *v.* Washington, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 144 Fed. Appx. 335.

No. 05–9430. Kilburn *v.* Dennehy, Commissioner, Massachusetts Department of Correction. C. A. 1st Cir. Certiorari denied.

No. 05–9434. Kerns *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 923 So. 2d 196.

No. 05–9461. Deherrera *v.* Colorado. Sup. Ct. Colo. Certiorari denied. Reported below: 122 P. 3d 992.

No. 05–9464. Carter et ux. *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. Reported below: 160 S. W. 3d 526.

No. 05–9488. Spencer *v.* Kemna, Superintendent, Crossroads Correctional Center. C. A. 8th Cir. Certiorari denied.

No. 05–9492. Kretchmar *v.* Beard, Secretary, Pennsylvania Department of Corrections, et al. Commw. Ct. Pa. Certiorari denied.

No. 05–9495. Cecrle *v.* Woodford, Acting Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 961.

No. 05–9497. Staten *v.* North Carolina. Ct. App. N. C. Certiorari denied. Reported below: 172 N. C. App. 673, 616 S. E. 2d 650.

No. 05–9500. LEDBETTER *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 275 Conn. 534, 881 A. 2d 290.

No. 05–9504. ALFORD *v.* BECK, SECRETARY, NORTH CAROLINA DEPARTMENT OF CORRECTION, ET AL. Sup. Ct. N. C. Certiorari denied.

No. 05–9531. MCQUEEN *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 922 So. 2d 995.

No. 05–9544. JOHNSON *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 05–9556. BLAND *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–9566. HEAD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 407 F. 3d 925.

No. 05–9574. NICHOLS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 143 Fed. Appx. 298.

No. 05–9577. FUENTES-BERLANGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 258.

No. 05–9583. GRAVES *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 144 Fed. Appx. 626.

No. 05–9587. HOANG VAN NGUYEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 377.

No. 05–9588. BLAZEK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 431 F. 3d 1104.

No. 05–9592. VESEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 05–9593. WILLINGHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–9596. THOMPSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 05–9604. RODRIGUEZ-CERDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 05–9605. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–9608. STAMPER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 142 Fed. Appx. 176.

No. 05–9611. LAMBROS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 05–9612. GUZMAN-SALINAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 809.

No. 05–9613. HOOKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 273.

No. 05–9620. FRAZIER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 05–9624. MENDOZA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 05–9627. TOVAR-AVILA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 693.

No. 05–9628. KIRBY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 89.

No. 05–9630. CHAUDHRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 424 F. 3d 1051.

No. 05–9631. CALCANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 05–9632. CRUTCHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–9633. HINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 429 F. 3d 114.

No. 05–9634. GEORGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 450.

No. 05–9635. MCGARVEY *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 329 Mont. 439, 124 P. 3d 1131.

No. 05–9637. GAMA MENDOZA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 421 F. 3d 663.

No. 05–9638. MURILLO-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 585.

No. 05–9639. ALAMO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 161 Fed. Appx. 196.

No. 05–9640. BOMBATA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 05–9644. BULLIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 142 Fed. Appx. 755.

No. 05–9645. AARON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–9646. HUBBARD *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 05–9649. SCURRY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 143 Fed. Appx. 513.

No. 05–9650. SHIVERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 913.

No. 05–9651. SHEARIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 952.

No. 05–9655. THOMAS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 888 A. 2d 1176.

No. 05–9658. ESPOSITO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 238.

No. 05–9661. CLINKINBEARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 606.

No. 05–9662. PEREZ-TRUJILLO, AKA GUTIERREZ, AKA CERDA-TREVINO, AKA HERNANDEZ LOZANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 572.

No. 05–9663. NORMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 427 F. 3d 537.

No. 05–9665. GOMEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 416 F. 3d 811.

No. 05–9668. Rodriguez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 900.

No. 05–9672. Tynes *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 938.

No. 05–9674. Thomas *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 623.

No. 05–9675. Lewelling *v.* Department of the Air Force. C. A. Fed. Cir. Certiorari denied. Reported below: 158 Fed. Appx. 292.

No. 05–9676. Bullard *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 162 Fed. Appx. 106.

No. 05–9677. Anderson *v.* Veach, Warden. C. A. 7th Cir. Certiorari denied.

No. 05–9678. Flores *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 05–9679. Armendariz *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 162.

No. 05–9681. Castaneda *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 411.

No. 05–9682. Kenemore *v.* Jeter, Warden, et al. C. A. 5th Cir. Certiorari denied.

No. 05–9684. Saunders *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 05–9685. Suarez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 947.

No. 05–9686. Simpson *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 430 F. 3d 1177.

No. 05–9687. Pless *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 432 F. 3d 1189.

No. 05–9689. Melvin *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 618.

No. 05–9690. Morris *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 839.

No. 05–9692. Velo-Villegas *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 598.

No. 05–9693. Wimbish *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 566.

No. 05–9695. Perez *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–9698. Hernandez-Garcia *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 548.

No. 05–9699. Cuellar-Cuellar *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 732.

No. 05–9700. Jordan *v.* United States; and
No. 05–9720. Jordan *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 136 Fed. Appx. 585.

No. 05–9701. Gwaltney *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 592.

No. 05–9702. Alvarado-Rivera *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 05–9704. Stephen *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 505.

No. 05–9706. Stacks *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 9.

No. 05–9708. Sherrill *v.* Rios, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 165 Fed. Appx. 617.

No. 05–9712. Davis *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 70.

No. 05–9714. Corchado *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 427 F. 3d 815.

No. 05–9715. Cobham *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 05–9717. Miller *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 434 F. 3d 820.

No. 05–9723. Starks *v.* United States. C. A. D. C. Cir. Certiorari denied.

No. 05–9729. ACEVEDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 713.

No. 05–9731. ALVARADO-SANTILANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 3d 794.

No. 05–9738. GRANDOS-ARREDONDO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 173 Fed. Appx. 206.

No. 05–9742. KING *v.* HOLT, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 153 Fed. Appx. 873.

No. 05–9743. CRUMBY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 05–9748. GANN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 57.

No. 05–9752. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–9753. BROWN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 805.

No. 05–9757. TARIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 609.

No. 05–9764. CRUZ-BARRAZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 768.

No. 05–9765. CHAVEZ-CUEVAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 888.

No. 05–9766. GONZALEZ-AGUILAR, AKA GONZALEZ AGUILAR, AKA GONZALEZ CORTEZ, AKA CORTEZ GONZALEZ, AKA GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 569.

No. 05–9767. DEL CASTILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 881.

No. 05–9769. GREENE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–9770. SCHMANKE *v.* IRVINS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 05–9772. Clark *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 799.

No. 05–9777. Chavez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 677.

No. 05–9780. Logan *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 05–9781. Mason *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 799.

No. 05–9787. Hamerter *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 05–9788. Ford *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–9792. Hernandez *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 492.

No. 05–9795. Curry *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–9797. Crane *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 05–9800. Souvannarath *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 984.

No. 05–9802. Perez-Manueles, aka Sierra, aka Altamirano *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 570.

No. 05–9804. Martinez-Castillo *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 607.

No. 05–9805. Lanier *v.* Lindsay, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–9807. Forbes *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 164 Fed. Appx. 251.

No. 05–9808. Castillo-Salazar, aka Castillo, aka Salazar Castillo *v.* United States; and Granados-Moreno *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 591 (second judgment) and 618 (first judgment).

No. 05–9809. Suggs *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 05–9810. Pedraza *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 05–9811. Gaul *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 05–9814. Antunez-Casares *v.* United States (Reported below: 158 Fed. Appx. 606); Castro *v.* United States (158 Fed. Appx. 544); Cecena-Verela *v.* United States (158 Fed. Appx. 609); Chavez *v.* United States (158 Fed. Appx. 608); Garcia-Perez *v.* United States (158 Fed. Appx. 600); Gutierrez-Martinez *v.* United States (158 Fed. Appx. 599); Hernandez-Nevarez *v.* United States (158 Fed. Appx. 595); Leyva-Posada *v.* United States (158 Fed. Appx. 596); Lopez-De La Cruz *v.* United States (158 Fed. Appx. 600); Martinez-Carrillo *v.* United States (158 Fed. Appx. 543); Olguin-Ramos *v.* United States (158 Fed. Appx. 597); Rivas-Flores *v.* United States (158 Fed. Appx. 607); Ruiz-Bernal *v.* United States (158 Fed. Appx. 598); Silva-Sandoval *v.* United States (158 Fed. Appx. 597); Velasquez-Martinez *v.* United States (158 Fed. Appx. 588); and Venegas-Chavez *v.* United States (158 Fed. Appx. 593). C. A. 5th Cir. Certiorari denied.

No. 05–9817. Gillian *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 434.

No. 05–9821. Hardaway, aka Thomas *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 05–9828. Gipson, aka Lewis, aka Jolly *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 788.

No. 05–9832. Lee *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 05–9834. Kizzee *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 613.

No. 05–9836. Dominguez-Primo *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 782.

No. 05–9838. Carroll *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–9839. Dia *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 159 Fed. Appx. 322.

No. 05–9840. Diaz-Boyzo, aka Zetina *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 432 F. 3d 1264.

No. 05–9841. Cuizon Relatos *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 877.

No. 05–9844. Rahim *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 431 F. 3d 753.

No. 05–9846. Ngamwuttibal *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 476.

No. 05–9847. Olson *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 482.

No. 05–9848. Grandison *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 143 Fed. Appx. 543.

No. 05–9851. Cox *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 578.

No. 05–9852. Cross *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 484.

No. 05–9854. Vigorito *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 05–9855. Moore *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 05–9858. Coyle *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 173.

No. 05–9860. Sanford *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 160 Fed. Appx. 1.

No. 05–9863. Gaskin *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 05–9864. Halat *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 648.

No. 05–9877. Danner *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 178.

No. 05–9879. Carroll *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 05–9882. Jenkins *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 496.

No. 05–9883. Kaniadakis *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 661.

No. 05–9886. Roa *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 894.

No. 05–9887. Benitez-Valencia *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 932.

No. 05–9891. Wilbourn *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 05–9893. Francois *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–9895. Williams *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 431 F. 3d 1234.

No. 05–9896. Watts *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 923.

No. 05–9899. Carroll *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–9900. Carroll *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–9903. Hicks *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 346.

No. 05–9910. Fulton *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–9913. Means *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 485.

No. 05–9915. JOSEPH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 180.

No. 05–9923. WALLACE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 382.

No. 05–9924. THOMAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–9926. MADU *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 551.

No. 05–9927. LEWIS *v.* CARAWAY, ACTING WARDEN. C. A. 8th Cir. Certiorari denied.

No. 05–9930. BORDERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 322.

No. 05–828. MORRIS *v.* RUMSFELD, SECRETARY OF DEFENSE. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 420 F. 3d 287.

No. 05–892. QASSIM ET AL. *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari before judgment denied.

No. 05–962. HOUK, WARDEN *v.* LOTT ET AL. C. A. 6th Cir. Motion of respondent Gregory Lott for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 424 F. 3d 446.

No. 05–1000. GORDON ET AL. *v.* LEWISTOWN HOSPITAL. C. A. 3d Cir. Motions of American Association of Ambulatory Surgery Centers et al., Federated Ambulatory Surgery Association et al., and American Osteopathic Association et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of these motions and this petition. Reported below: 423 F. 3d 184.

No. 05–1031. PALLOTTA *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 144 Fed. Appx. 938.

No. 05–1033. DIGIACOMO *v.* TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 154 Fed. Appx. 312.

No. 05–1045. Pittsburgh Transportation Co. *v.* Packard et al. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 418 F. 3d 246.

No. 05–1068. Powerex Corp., dba Powerex Energy Corp. *v.* California Department of Water Resources. C. A. 9th Cir. Certiorari before judgment denied.

No. 05–9072. LaFreniere *v.* Regents of the University of California. C. A. 9th Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition.

No. 05–9097. Goins *v.* Gillis, Superintendent, State Correctional Institution at Coal Township, et al. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition.

No. 05–9161. Mason *v.* Grace, Superintendent, State Correctional Institution at Huntingdon, et al. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 156 Fed. Appx. 452.

No. 05–9224. Mierzwa et ux. *v.* City of Garfield, New Jersey, et al. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 170 Fed. Appx. 212.

No. 05–9358. Terry *v.* Grace, Superintendent, State Correctional Institution at Huntingdon. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition.

No. 05–9372. Cobbs *v.* Wilson, Superintendent, State Correctional Institution at Fayette, et al. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition.

No. 05–9496. Kerrigan *v.* Chao, Secretary of Labor. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 151 Fed. Appx. 129.

No. 05–9603. LUZARDO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 05–9744. VILLAR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

*Rehearing Denied*

No. 04–10246. HARRISON *v.* GREEN, WARDEN, ET AL., 546 U. S. 842;
No. 05–689. IN RE CLEMENTS, 546 U. S. 1168;
No. 05–693. CRAIG ET UX. *v.* BASHEER & EDGEMOORE ET AL., 546 U. S. 1171;
No. 05–747. IN RE GIBBONS, 546 U. S. 1168;
No. 05–796. GUAM *v.* FIRST NATIONAL BANK OF OMAHA, 546 U. S. 1215;
No. 05–832. ROBINSON *v.* UNITED STATES, 546 U. S. 1176;
No. 05–6699. BROWN *v.* UNITED STATES, 546 U. S. 995;
No. 05–7003. HARVEY *v.* LOUISIANA, 546 U. S. 1099;
No. 05–7295. BENSON *v.* LUTTRELL ET AL., 546 U. S. 1105;
No. 05–7590. OSEQUERA-MORALES *v.* UNITED STATES, 546 U. S. 1112;
No. 05–7762. OZENNE *v.* CHASE MANHATTAN BANK ET AL., 546 U. S. 1178;
No. 05–7771. DAY-PETRANO *v.* FLORIDA ET AL., 546 U. S. 1179;
No. 05–7866. FORD *v.* APPELLATE DIVISION, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, 546 U. S. 1180;
No. 05–7877. CARTER, AKA TONEY *v.* FRITO-LAY, INC., ET AL., 546 U. S. 1180;
No. 05–7879. COOKE *v.* SUMMERS, ATTORNEY GENERAL OF TENNESSEE, 546 U. S. 1180;
No. 05–7895. FAISON *v.* FLORIDA PAROLE AND PROBATION COMMISSION ET AL., 546 U. S. 1181;
No. 05–8013. ATWELL *v.* PENNSYLVANIA, 546 U. S. 1184;
No. 05–8083. STEELE *v.* FLORIDA, 546 U. S. 1185;
No. 05–8088. IN RE RIVERA, 546 U. S. 1168;
No. 05–8095. SPOTTSVILLE *v.* RAY ET AL., 546 U. S. 1186;
No. 05–8108. GIBBONS *v.* TWIGG ET AL., 546 U. S. 1186;

No. 05–8146. White *v.* Burdick, Trustee, 546 U. S. 1187;

No. 05–8169. Gerkin *v.* Butler, Warden, 546 U. S. 1188;

No. 05–8224. Williams *v.* United States District Court for the Eastern District of Virginia, 546 U. S. 1155;

No. 05–8238. Turner *v.* Anadarko Petroleum Corp. et al., 546 U. S. 1216;

No. 05–8317. Skoczen *v.* United States, 546 U. S. 1192;

No. 05–8333. Olic *v.* Gonzales, Attorney General, 546 U. S. 1218;

No. 05–8385. Ciriaco *v.* United States, 546 U. S. 1194;

No. 05–8424. Pryor *v.* United States, 546 U. S. 1196;

No. 05–8446. Remsen *v.* Knowles, Warden, et al., 546 U. S. 1218;

No. 05–8495. In re Campaz, 546 U. S. 1168;

No. 05–8527. In re Aloma, 546 U. S. 1168;

No. 05–8530. In re Arroyo, 546 U. S. 1168;

No. 05–8531. In re Estupinan, 546 U. S. 1168;

No. 05–8532. In re Garcia Estupinan, 546 U. S. 1168;

No. 05–8533. In re Enriquez, 546 U. S. 1168;

No. 05–8554. In re Saldana, 546 U. S. 1168;

No. 05–8582. Schoenrogge *v.* Department of Justice, 546 U. S. 1200;

No. 05–8613. Ewing *v.* Massachusetts, 546 U. S. 1218;

No. 05–8627. Carrion *v.* United States, 546 U. S. 1202;

No. 05–8655. Morris *v.* Cason, Warden, 546 U. S. 1203;

No. 05–8826. Silo *v.* United States et al., 546 U. S. 1220;

No. 05–8842. In re Upshaw, 546 U. S. 1168;

No. 05–8892. Wyman *v.* United States, 546 U. S. 1221;

No. 05–8992. In re Brown, 546 U. S. 1214; and

No. 05–9091. Adams *v.* Davis, Warden, *ante*, p. 1011. Petitions for rehearing denied.

No. 05–797. Guam *v.* Citibank (South Dakota), N. A., 546 U. S. 1225;

No. 05–8433. Shymatta *v.* Microsoft Corp., 546 U. S. 1225; and

No. 05–8539. Hodge *v.* Harvey, Secretary of the Army, et al., *ante*, p. 1014. Petitions for rehearing denied. The Chief Justice took no part in the consideration or decision of these petitions.

### April 19, 2006

*Miscellaneous Order*

No. 04–1360. Hudson *v.* Michigan. Ct. App. Mich. [Certiorari granted, 545 U. S. 1138.] Case restored to calendar for reargument.

### April 20, 2006

*Certiorari Denied*

No. 05–10391 (05A935). Brown *v.* North Carolina. Gen. Ct. Justice, Super. Ct. Div., Martin County, N. C. Application for stay of execution of sentence of death, presented to The Chief Justice, and by him referred to the Court, denied. Certiorari denied.

No. 05–10482 (05A955). Brown *v.* Beck, Secretary, North Carolina Department of Correction, et al. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to The Chief Justice, and by him referred to the Court, denied. Certiorari denied. Reported below: 445 F. 3d 752.

### April 24, 2006

*Certiorari Granted—Vacated and Remanded.* (See also No. 05–8400, *ante*, p. 188.)

*Certiorari Dismissed*

No. 05–9366. Jones *v.* South Carolina. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders*

No. 05–1056. Microsoft Corp. *v.* AT&T Corp. C. A. Fed. Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. The Chief Justice took no part in the consideration or decision of this order.

No. 05–8794. Hill *v.* McDonough, Interim Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. [Certiorari granted *sub nom. Hill* v. *Crosby, Secretary, Florida Department of Corrections, et al.*, 546 U. S. 1158.] Motion of petitioner for appointment of counsel granted. D. Todd Doss, Esq., of Lake City, Fla., is appointed to serve as counsel for petitioner in this case.

No. 05–10118. In re Sanchez-Gonzalez. Petition for writ of habeas corpus denied.

No. 05–9621. In re Doose. Petition for writ of mandamus denied.

*Certiorari Denied*

No. 05–611. North Dakota et al. *v.* United States Army Corps of Engineers et al.;
No. 05–631. Environmental Defense et al. *v.* United States Army Corps of Engineers et al.; and
No. 05–782. Nebraska Public Power District *v.* United States Fish and Wildlife Service et al. C. A. 8th Cir. Certiorari denied. Reported below: 421 F. 3d 618.

No. 05–787. Magleby *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 420 F. 3d 1136.

No. 05–899. Baldwinsville Central School District et al. *v.* Peck, a Minor, By and Through His Parents and Next Friends, Peck et vir. C. A. 2d Cir. Certiorari denied. Reported below: 426 F. 3d 617.

No. 05–903. Schriro, Director, Arizona Department of Corrections *v.* Summerlin. C. A. 9th Cir. Certiorari denied. Reported below: 427 F. 3d 623.

No. 05–1038. Valladares *v.* Diede et al. C. A. 9th Cir. Certiorari denied.

No. 05–1040. Brennan's Inc. *v.* Brennan et al. C. A. 5th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 365.

No. 05–1047. Jones *v.* Jones. C. A. 4th Cir. Certiorari denied.

No. 05–1054. Culpepper *v.* Culpepper et al. C. A. 3d Cir. Certiorari denied.

No. 05–1063. Dimery *v.* Ulster Savings Bank. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 13 App. Div. 3d 574, 789 N. Y. S. 2d 159.

No. 05–1064. MITRANO *v.* WARSHELL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 277.

No. 05–1067. BROWNFIELD *v.* METROPOLITAN LIFE INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 143 Fed. Appx. 819.

No. 05–1069. GREEN ET AL. *v.* CLEARY WATER, SEWER & FIRE DISTRICT. Sup. Ct. Miss. Certiorari denied. Reported below: 910 So. 2d 1022.

No. 05–1071. CHASE *v.* JORDAN SCHOOL DISTRICT. Ct. App. Utah. Certiorari denied.

No. 05–1072. TUNE *v.* GREEN. Ct. Civ. App. Okla. Certiorari denied.

No. 05–1102. LOUISIANA BOARD OF REGENTS ET AL. *v.* BENNETT-NELSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 3d 448.

No. 05–1117. MORGAN *v.* DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES. C. A. 6th Cir. Certiorari denied.

No. 05–1122. KELLY *v.* DEPARTMENT OF LABOR. C. A. 6th Cir. Certiorari denied.

No. 05–1137. COMMITTE *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 916 So. 2d 741.

No. 05–1174. BROOKS *v.* LUBBOCK COUNTY HOSPITAL, DBA UNIVERSITY MEDICAL CENTER. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 05–1179. MONTEZUMA COUNTY BOARD OF COMMISSIONERS ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO ET AL. C. A. 10th Cir. Certiorari denied.

No. 05–1186. COLLINS *v.* JAMES. C. A. D. C. Cir. Certiorari denied. Reported below: 171 Fed. Appx. 859.

No. 05–1198. STANLEY ET AL. *v.* DEPARTMENT OF JUSTICE. C. A. Fed. Cir. Certiorari denied. Reported below: 423 F. 3d 1271.

No. 05–1238. Hughes *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 271.

No. 05–1242. Krilich *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 05–7669. Hundley *v.* Harrison, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 135 Fed. Appx. 55.

No. 05–7898. Hood *v.* Uchtman, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 414 F. 3d 736.

No. 05–7962. Williams *v.* Florida. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 909 So. 2d 939.

No. 05–8212. Butler *v.* Dewalt, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 144 Fed. Appx. 992.

No. 05–8475. Lopez *v.* Wilson, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 426 F. 3d 339.

No. 05–8561. Cunningham *v.* North Carolina. Ct. App. N. C. Certiorari denied. Reported below: 172 N. C. App. 172, 616 S. E. 2d 29.

No. 05–8753. Merridith *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 05–8774. Landers *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 417 F. 3d 958.

No. 05–8807. Carter *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 36 Cal. 4th 1114, 117 P. 3d 476.

No. 05–9289. Rocha *v.* Watkins et al. C. A. 10th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 56.

No. 05–9294. Hernandez *v.* Grigas, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 575.

No. 05–9302. Dunston *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 913 So. 2d 1258.

No. 05–9304. Casnave *v.* LaVigne, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 435.

No. 05–9306. S. R. *v.* District of Columbia et al. Ct. App. D. C. Certiorari denied. Reported below: 887 A. 2d 1027.

No. 05–9309. Smith *v.* White et al. C. A. 6th Cir. Certiorari denied.

No. 05–9312. Koons *v.* Cotton, Superintendent, Pendleton Correctional Facility. C. A. 7th Cir. Certiorari denied.

No. 05–9313. Dunkle *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 36 Cal. 4th 861, 116 P. 3d 494.

No. 05–9321. Lena *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 901 So. 2d 227.

No. 05–9326. Mata *v.* Giurbino, Warden. C. A. 9th Cir. Certiorari denied.

No. 05–9344. Smith *v.* Cooke, Warden, et al. C. A. 11th Cir. Certiorari denied.

No. 05–9349. Marion *v.* McDonough, Interim Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 05–9350. Marion *v.* Florida. C. A. 11th Cir. Certiorari denied.

No. 05–9352. Stanford *v.* Smith, Warden, et al. C. A. 11th Cir. Certiorari denied.

No. 05–9353. Randall *v.* Behrns et al. C. A. 5th Cir. Certiorari denied. Reported below: 141 Fed. Appx. 307.

No. 05–9356. Travers *v.* Palakovich, Superintendent, State Correctional Institution at Smithfield, et al. C. A. 3d Cir. Certiorari denied.

No. 05–9357. Trevino *v.* Texas. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 05–9361. Berry *v.* Bailey et al. C. A. 11th Cir. Certiorari denied.

No. 05–9364. Conley *v.* Pollard, Warden. C. A. 7th Cir. Certiorari denied.

No. 05–9377. Randolph *v.* Tatarow Family Partners, Ltd., et al. C. A. 11th Cir. Certiorari denied.

No. 05–9378. Stauffer *v.* Stauffer. Ct. App. Neb. Certiorari denied.

No. 05–9380. Taylor *v.* McDonough, Interim Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 05–9384. Taylor *v.* Howes, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–9385. Walker *v.* Jastremski et al. C. A. 2d Cir. Certiorari denied. Reported below: 430 F. 3d 560.

No. 05–9387. Minton *v.* Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 05–9388. Cruz *v.* Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 05–9391. Childs *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 941 So. 2d 388.

No. 05–9393. Caver *v.* Mosley, Warden. C. A. 11th Cir. Certiorari denied.

No. 05–9396. Sherman *v.* Ryan, Acting Warden. C. A. 9th Cir. Certiorari denied.

No. 05–9419. Harbison *v.* Bell, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 408 F. 3d 823.

No. 05–9440. Crisp *v.* Motley, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–9451. Browne *v.* Nicholson, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 135 Fed. Appx. 427.

No. 05–9452. Robison *v.* Harrison, Warden. C. A. 9th Cir. Certiorari denied.

No. 05–9480. Wilson *v.* Nicholson, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied.

No. 05–9503. Rivers *v.* Michigan. Cir. Ct. Macomb County, Mich. Certiorari denied.

No. 05–9513. NASH *v.* DUNCAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 660.

No. 05–9518. DORCHY *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 05–9528. SAMONTE *v.* BENNETT, ATTORNEY GENERAL OF HAWAII, ET AL. C. A. 9th Cir. Certiorari denied.

No. 05–9536. CALLOWAY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 05–9537. LEVENICK *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 876 A. 2d 465.

No. 05–9542. MALONE *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 364 Ark. 256, 217 S. W. 3d 810.

No. 05–9555. BRACKETT *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 05–9565. FIRMIN *v.* GILL ET AL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 898 So. 2d 640.

No. 05–9575. MURRAY *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 05–9622. EDMONSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 357 Ill. App. 3d 1086, 895 N. E. 2d 695.

No. 05–9660. EDWARDS *v.* ABBOTT, WARDEN, ET AL. Sup. Ct. Wyo. Certiorari denied.

No. 05–9688. PARKINSON *v.* CONWAY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 951.

No. 05–9691. NORRIS *v.* WILLS ET VIR. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 05–9749. WILLIAMS *v.* FOLINO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 05–9754. Burke *v.* Beard, Secretary, Pennsylvania Department of Corrections, et al. C. A. 3d Cir. Certiorari denied.

No. 05–9762. Matthews *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 161 Fed. Appx. 952.

No. 05–9819. Bastable *v.* Internal Revenue Service et al. C. A. 2d Cir. Certiorari denied. Reported below: 159 Fed. Appx. 299.

No. 05–9822. Thomas *v.* Shannon, Superintendent, State Correctional Institution at Frackville, et al. C. A. 3d Cir. Certiorari denied.

No. 05–9918. Matin *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 599.

No. 05–9934. Hawkins *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–9935. Griffin *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 152 Fed. Appx. 860.

No. 05–9936. Gutzmore *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–9937. Francis *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–9939. Hill *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 410 F. 3d 468.

No. 05–9942. Cleaver *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 622.

No. 05–9944. Morgan *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 694.

No. 05–9947. Martinez *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 05–9948. Balereso *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 860.

No. 05–9949. Vargas-Garcia *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 3d 345.

No. 05–9952. BAILEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 417 F. 3d 873.

No. 05–9955. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 704.

No. 05–9956. STEPHENSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 50.

No. 05–9960. RODRIGUEZ-MOTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 541.

No. 05–9962. HERRON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 432 F. 3d 1127.

No. 05–9963. FRANKLIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–9966. HINTZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–9969. FREEMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 05–9970. GARCIA-MEJIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 145 Fed. Appx. 954.

No. 05–9972. SIJAS-MARTINEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 164 Fed. Appx. 72.

No. 05–9977. LINDSEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 708.

No. 05–9978. LOCKE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 518.

No. 05–9979. NAMER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 385.

No. 05–9980. MEJIA-MEJIVAR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 504.

No. 05–9983. SEIBERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 121 Fed. Appx. 715.

No. 05–9985. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 3d 767.

No. 05–9991. CELESTINE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 493.

No. 05–10006. BRADLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 353.

No. 05–10007. WENGLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 375.

No. 05–10012. MAJID *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA. C. A. 10th Cir. Certiorari denied.

No. 05–10014. STOVER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 147 Fed. Appx. 152.

No. 05–10016. CAUFIELD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 13.

No. 05–10022. MELTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 05–10023. SCHOENAUER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 427 F. 3d 537.

No. 05–10026. COLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 634.

No. 05–10029. LEWIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 376.

No. 05–10035. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 206.

No. 05–10038. CORINES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 05–10041. KENNEDY *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied.

No. 05–10044. BENNETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 366.

No. 05–10045. ARRATE-RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 829.

No. 05–10051. ESTELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 698.

No. 05–10052. DUNCAN *v.* UNITED STATES; and BRADSHAW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 368 (first judgment) and 399 (second judgment).

No. 05–10054. COVELLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–10059. SANCHEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 778.

No. 05–10066. ADDO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 05–1059. RODRIGUEZ ET AL. *v.* NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 05–1078. MINNESOTA *v.* ALLEN. Sup. Ct. Minn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 706 N. W. 2d 40.

No. 05–8268. MORELAND *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. 5th Cir.; and

No. 05–8504. O'DONALD *v.* JOHNS, WARDEN. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of petition No. 05–8504. Reported below: No. 05–8268, 431 F. 3d 180; No. 05–8504, 402 F. 3d 172.

Statement of JUSTICE STEVENS respecting the denial of the petitions for writs of certiorari.

The legal question presented by these certiorari petitions is whether the phrase "term of imprisonment" in 18 U. S. C. § 3624(b) means "sentence imposed," as petitioners argue, or "time served," as the Government contends. The answer to that question determines the actual amount of good-time credits that prisoners serving federal sentences may earn, and therefore how much time they may actually spend in prison. For prisoners who consistently comply with prison regulations, the difference in approaches amounts to about a week for each year of their sentences. The issue, accordingly, is of great importance to such prisoners. Given the numbers affected and the expense of housing prisoners, it surely also has a significant impact on the public fisc.

The fact that 10 Courts of Appeals have either agreed with, or deferred to, the Government's interpretation provides a principled basis for denying these certiorari petitions. Nevertheless, I think it appropriate to emphasize that the Court's action does not constitute a ruling on the merits and certainly does not represent an expression of any opinion concerning the wisdom of the Government's position. As demonstrated by the thoughtful opinion prepared by Magistrate Judge Stephen Smith, 363 F. Supp. 2d 882 (SD Tex.) (case below in No. 05–8268), rev'd, 431 F. 3d 180 (CA5 2005), both the text and the history of the statute strongly suggest that it was not intended to alter the pre-existing approach of calculating good-time credit based on the sentence imposed.

Despite its technical character, the question has sufficient importance to merit further study, not only by judges but by other Government officials as well. Nine out of ten Circuits have recognized that the Federal Bureau of Prisons has the discretion to adopt petitioners' approach, and Congress of course has the power to clarify the matter. Indeed, Congress has done so once before—in 1959 Congress amended the predecessor statute to § 3624(b) for the specific purpose of undoing a judicial determination that credit should be based on time served rather than on the sentence imposed. See Pub. L. 86–259, 73 Stat. 546; see also H. R. Rep. No. 935, 86th Cong., 1st Sess. (1959). Congress rejected this judicial determination because it had the troubling effect of "requir[ing] well-behaved prisoners to serve longer sentences of confinement than they would under the method of computation which has been used through half a century." *Id.*, at 2. This same concern may well prompt Congress to provide further guidance as to what § 3624(b) means by "term of imprisonment."

No. 05–8743. Blair *v.* California. Sup. Ct. Cal. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 36 Cal. 4th 686, 115 P. 3d 1145.

No. 05–9418. Richards *v.* Gonzales, Attorney General (two judgments). C. A. 3d Cir. Certiorari denied. Justice

ALITO took no part in the consideration or decision of this petition. Reported below: 149 Fed. Appx. 114 (second judgment).

No. 05–9988. HAZEL *v.* SMITH, WARDEN. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 142 Fed. Appx. 131.

No. 05–10010. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 418 F. 3d 368.

*Rehearing Denied*

No. 05–718. NORMAN *v.* BELLSOUTH INTELLECTUAL PROPERTY CORP., 546 U. S. 1172;

No. 05–833. WILLIAMS *v.* GEORGIA DEPARTMENT OF DEFENSE NATIONAL GUARD HEADQUARTERS ET AL., 546 U. S. 1176;

No. 05–854. WIDTFELDT *v.* UNITED STATES ET AL., 546 U. S. 1215;

No. 05–5296. CANE *v.* HONDA OF AMERICA MANUFACTURING, INC., 546 U. S. 894;

No. 05–6849. GRIFFIN *v.* WILEY, WARDEN, 546 U. S. 1215;

No. 05–7268. WALDEN *v.* UNITED STATES, *ante,* p. 1022;

No. 05–7570. ROMERO *v.* UNITED STATES, 546 U. S. 1082;

No. 05–7764. PATKINS *v.* CALIFORNIA, 546 U. S. 1152;

No. 05–7813. HINSON *v.* THOMPSON ET AL., 546 U. S. 1179;

No. 05–7943. EPPERSON *v.* IRVINE, 546 U. S. 1182;

No. 05–7979. BESTER *v.* BROCKTON HOUSING AUTHORITY, 546 U. S. 1183;

No. 05–8070. THOMPSON *v.* OVERTON ET AL., 546 U. S. 1185;

No. 05–8159. GRISSOM *v.* HARRISON, WARDEN, 546 U. S. 1187;

No. 05–8177. GIBBS *v.* UNITED STATES, 546 U. S. 1153;

No. 05–8363. ZAMMIT *v.* CITY OF NEW BALTIMORE POLICE DEPARTMENT, 546 U. S. 1193;

No. 05–8416. LEWIS *v.* UNITED STATES, 546 U. S. 1196;

No. 05–8467. MILLS *v.* HELLING, WARDEN, ET AL., *ante,* p. 1007;

No. 05–8488. IN RE REVELO MORENO, 546 U. S. 1168;

No. 05–8490. IN RE RIASCOS, 546 U. S. 1168;

No. 05–8494. IN RE GONZALEZ MURILLO, 546 U. S. 1168;

No. 05–8515. BAXTER *v.* UNITED STATES, 546 U. S. 1199;

No. 05–8526. IN RE SINISTERRA ASTUDILLO, 546 U. S. 1168;

No. 05–8529. IN RE CAICEDO, 546 U. S. 1168;

No. 05–8783. IN RE SANCHEZ, 546 U. S. 1168;

No. 05–8846. Higgins *v.* Liston, 546 U. S. 1220; and

No. 05–8888. In re Newman, 546 U. S. 1168. Petitions for rehearing denied.

No. 05–5814. Ransom *v.* Harrison, Warden, 546 U. S. 963; and

No. 05–6064. Copley *v.* United States District Court for the Eastern District of North Carolina, 546 U. S. 949. Motions for leave to file petitions for rehearing denied.

## April 27, 2006

*Miscellaneous Order*

No. 05A971. Vinson *v.* Johnson, Director, Virginia Department of Corrections, et al. Application for stay of execution of sentence of death, presented to The Chief Justice, and by him referred to the Court, denied.

*Certiorari Denied*

No. 05–10459 (05A949). Vinson *v.* Kelly, Warden. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to The Chief Justice, and by him referred to the Court, denied. Certiorari denied. Justice Stevens and Justice Ginsburg would grant the application for stay of execution. Reported below: 436 F. 3d 412.

## April 28, 2006

*Dismissal Under Rule 46*

No. 05–1111. Clark et al. *v.* Wyeth. C. A. 3d Cir. Certiorari dismissed as to the law firms of Hariton and D'Angelo, LLP, and Napoli, Kaiser, Bern & Associates, LLP, and all persons represented by those law firms under this Court's Rule 46. Reported below: 431 F. 3d 141.

## May 1, 2006

*Certiorari Dismissed*

No. 05–9435. Marian *v.* Ventura County, California. Sup. Ct. Cal. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 05–9576. GANT *v.* LOCKHEED MARTIN CORP. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 152 Fed. Appx. 396.

*Miscellaneous Orders*

No. 05M80. WAHL *v.* BETHEL SCHOOL DISTRICT NO. 403. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 05–9320. JACKSON *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1038] denied.

No. 05–9916. KLIESH *v.* BUCKS COUNTY DOMESTIC RELATIONS. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 22, 2006, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court. JUSTICE ALITO took no part in the consideration or decision of this motion.

No. 05–10217. IN RE SISNEROS; and
No. 05–10275. IN RE FOGLE. Petitions for writs of habeas corpus denied.

No. 05–1139. IN RE MCDONALD;
No. 05–9472. IN RE ALLEN; and
No. 05–9490. IN RE ADAMS. Petitions for writs of mandamus denied.

No. 05–9671. IN RE HIGGINS. Petition for writ of mandamus and/or prohibition denied.

*Certiorari Granted*

No. 05–493. ORNASKI, WARDEN *v.* BELMONTES. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 414 F. 3d 1094.

*Certiorari Denied*

No. 04–1611. NEBRASKA BEEF, LTD. *v.* GREENING ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 398 F. 3d 1080.

No. 05–64. Izen et ux. *v.* Catalina. C. A. 5th Cir. Certiorari denied. Reported below: 398 F. 3d 363.

No. 05–815. Doe *v.* Mann et al.; and
No. 05–951. Mann et al. *v.* Doe. C. A. 9th Cir. Certiorari denied. Reported below: 415 F. 3d 1038.

No. 05–940. Yanaki et al. *v.* Parr, Waddoups, Brown, Gee & Loveless, et al. C. A. 10th Cir. Certiorari denied. Reported below: 415 F. 3d 1204.

No. 05–945. Mezibov *v.* Allen et al. C. A. 6th Cir. Certiorari denied. Reported below: 411 F. 3d 712.

No. 05–948. Simkanin *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 420 F. 3d 397.

No. 05–954. Piper Jaffray & Co. et al. *v.* Tomazich. Sup. Ct. Mont. Certiorari denied. Reported below: 328 Mont. 523, 120 P. 3d 811.

No. 05–1075. Norton *v.* Town of Long Island, Maine, et al. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 883 A. 2d 889.

No. 05–1080. Mercy Hospital, Inc. *v.* Massachusetts Nurses Assn. C. A. 1st Cir. Certiorari denied. Reported below: 429 F. 3d 338.

No. 05–1083. American Coalition of Life Activists et al. *v.* Planned Parenthood of the Columbia/Willamette, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 3d 949.

No. 05–1085. Simpson *v.* Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 134 Fed. Appx. 303.

No. 05–1086. Smith, Personal Representative of the Estate of Smith, Deceased *v.* Botsford General Hospital. C. A. 6th Cir. Certiorari denied. Reported below: 419 F. 3d 513.

No. 05–1088. Goodspeed Airport, LLC, et al. *v.* Ventres et al.; and Goodspeed Airport, LLC, et al. *v.* Rocque, Commissioner, Connecticut Department of Environmental Protection. Sup. Ct. Conn. Certiorari denied. Reported below: 275 Conn. 105, 881 A. 2d 937 (first judgment); 275 Conn. 161, 881 A. 2d 972 (second judgment).

No. 05–1094. Horton *v.* Ahler et al. C. A. 9th Cir. Certiorari denied. Reported below: 127 Fed. Appx. 352.

No. 05–1096. Guttman *v.* Silverberg et al. C. A. 10th Cir. Certiorari denied. Reported below: 167 Fed. Appx. 1.

No. 05–1100. Troupe, as Personal Representative for the Estate of Robinson, Deceased, et al. *v.* Sarasota County, Florida, et al. C. A. 11th Cir. Certiorari denied. Reported below: 419 F. 3d 1160.

No. 05–1104. Talley *v.* Housing Authority of Columbus, Georgia. C. A. 11th Cir. Certiorari denied. Reported below: 131 Fed. Appx. 693.

No. 05–1105. Olson *v.* Williams et al. C. A. 8th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 77.

No. 05–1106. Miller *v.* Harkleroad, Superintendent, Marion Correctional Institution. C. A. 4th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 678.

No. 05–1110. Bidoae *v.* Hartford Golf Club et al. App. Ct. Conn. Certiorari denied. Reported below: 91 Conn. App. 470, 881 A. 2d 418.

No. 05–1127. Buric *v.* Kelly, Individually and as the Commissioner of the New York City Police Department, et al. C. A. 2d Cir. Certiorari denied. Reported below: 157 Fed. Appx. 391.

No. 05–1134. Martinez et al. *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 357 Ill. App. 3d 1087, 895 N. E. 2d 695.

No. 05–1140. Phelps *v.* Kentucky. Ct. App. Ky. Certiorari denied.

No. 05–1144. Fracht FWO AG *v.* LCI Shipholdings, Inc., for Itself and as the Successor in Interest to Forest Lines, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 929.

No. 05–1156. BALOGUN *v.* GONZALES, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 425 F. 3d 1356.

No. 05–1162. CHARTER COMMUNICATIONS, INC. *v.* BROADCAST INNOVATION, L. L. C., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 420 F. 3d 1364.

No. 05–1163. JONES *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 34 Kan. App. 2d xxv, 114 P. 3d 190.

No. 05–1173. LIN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 159 Fed. Appx. 186.

No. 05–1178. GRABILL *v.* GRABILL. Ct. Sp. App. Md. Certiorari denied. Reported below: 164 Md. App. 734.

No. 05–1182. WEISS *v.* BERKETT, AS SUCCESSOR INTERIM TRUSTEE OF THE TRUSTS UNDER THE WILL OF POLLAK, DECEASED, ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 907 So. 2d 1181.

No. 05–1185. ALISAL WATER CORP. ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 431 F. 3d 643.

No. 05–1215. MCALLISTER TOWING & TRANSPORTATION CO., INC., ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 432 F. 3d 216.

No. 05–1228. PLANET EARTH FOUNDATION, DBA PLANET EARTH MEDIA *v.* NEW YORK UNIVERSITY. C. A. 2d Cir. Certiorari denied. Reported below: 163 Fed. Appx. 13.

No. 05–1241. WALTER *v.* COMMISSION FOR LAWYER DISCIPLINE. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 05–1250. ALERRE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 430 F. 3d 681.

No. 05–1253. GEE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 432 F. 3d 713.

No. 05–1261. ALFORD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 147 Fed. Appx. 45.

No. 05–8235. JAMES *v.* WILLIAMS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 144 Fed. Appx. 353.

No. 05–8367. TIMBERLAKE *v.* BUSS, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 409 F. 3d 819.

No. 05–8729. BAZZETTA *v.* STOVALL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 05–8847. WEILAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 420 F. 3d 1062.

No. 05–8900. CERVANTES-FLORES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 421 F. 3d 825.

No. 05–8918. MCHOUL *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 445 Mass. 143, 833 N. E. 2d 1146.

No. 05–8927. RIVERA-NEVAREZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 418 F. 3d 1104.

No. 05–8930. SCHATZ ET UX. *v.* FRANKLIN COUNTY, MISSOURI, DIVISION OF FAMILY SERVICES, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 422 F. 3d 655.

No. 05–9043. HALE *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 05–9381. WOOLLEY *v.* MINNESOTA BOARD OF MEDICAL PRACTICE. Ct. App. Minn. Certiorari denied.

No. 05–9394. KINDRED *v.* LA BOSSIERE ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 05–9397. REDFORD *v.* HAMIL, JUDGE, SUPERIOR COURT OF GEORGIA, GWINNETT JUDICIAL CIRCUIT. Ct. App. Ga. Certiorari denied.

No. 05–9398. ROSE *v.* MCADORY ET AL. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 05–9405. PAIGE *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 05–9429. Juniors *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 915 So. 2d 291.

No. 05–9441. Stramaglia *v.* Family Independence Agency. Ct. App. Mich. Certiorari denied.

No. 05–9445. Brown *v.* Kentucky. Sup. Ct. Ky. Certiorari denied. Reported below: 174 S. W. 3d 421.

No. 05–9446. Bunch *v.* North Carolina Department of Correction et al. C. A. 4th Cir. Certiorari denied. Reported below: 141 Fed. Appx. 234.

No. 05–9447. Lynch *v.* McBride, Warden. Cir. Ct. Kanawha County, W. Va. Certiorari denied.

No. 05–9448. Woodell *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 858 A. 2d 1285.

No. 05–9457. Vincze *v.* United States District Court for the Eastern District of California. C. A. 9th Cir. Certiorari denied.

No. 05–9458. Williams *v.* New York. Ct. App. N. Y. Certiorari denied. Reported below: 6 N. Y. 3d 760, 843 N. E. 2d 1168.

No. 05–9463. Sims *v.* Cedar Park Elementary. C. A. 8th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 78.

No. 05–9471. Blackburn *v.* Renico, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–9473. Stephenson *v.* City of Elmira, New York, et al. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 18 App. Div. 3d 978, 795 N. Y. S. 2d 141.

No. 05–9474. Proctor *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 05–9475. Mendiola *v.* Texas. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 05–9477. Jove *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 05–9479. LEWIS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 279 Ga. 756, 620 S. E. 2d 778.

No. 05–9482. COURTOIS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 05–9483. DAVIS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 474 Mich. 944, 706 N. W. 2d 200.

No. 05–9491. JOHNSON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 274 Ga. App. 69, 616 S. E. 2d 848.

No. 05–9493. OVEAL *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 164 S. W. 3d 735.

No. 05–9498. SCHRACK *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 05–9502. KELLY *v.* BRIGANO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 05–9505. BLACKMAN *v.* MARR ET AL. C. A. 7th Cir. Certiorari denied.

No. 05–9519. ELDRIDGE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 05–9521. MEDINA *v.* SMITH, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 05–9539. JEFFERSON *v.* DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 05–9540. LASH *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 356 Ill. App. 3d 1146, 889 N. E. 2d 816.

No. 05–9572. STRAHAN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 05–9595. TORREZ *v.* YATES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–9598. TAYLOR *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 05–9602. Petrillo *v.* Murphy, Superintendent, Massachusetts Treatment Center. C. A. 1st Cir. Certiorari denied. Reported below: 428 F. 3d 41.

No. 05–9609. Smith *v.* Stewart et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 05–9625. Woolbright *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 920 So. 2d 6.

No. 05–9648. Mills *v.* Helling, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 127 Fed. Appx. 342.

No. 05–9705. Sky et vir *v.* Alaska. Sup. Ct. Alaska. Certiorari denied.

No. 05–9718. Mariano *v.* Department of Labor. C. A. 9th Cir. Certiorari denied. Reported below: 143 Fed. Appx. 6.

No. 05–9722. Ferrizz *v.* Giurbino, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 432 F. 3d 990.

No. 05–9735. Small *v.* Rozum, Superintendent, State Correctional Institution at Somerset, et al. C. A. 3d Cir. Certiorari denied.

No. 05–9737. Radford *v.* Crist, Attorney General of Florida, et al. C. A. 11th Cir. Certiorari denied.

No. 05–9755. Belcher *v.* Kemna, Superintendent, Crossroads Correctional Center. C. A. 8th Cir. Certiorari denied.

No. 05–9760. LaFreniere *v.* Regents of the University of California. C. A. 9th Cir. Certiorari denied. Reported below: 172 Fed. Appx. 136.

No. 05–9783. Harrell *v.* Carey, Warden. C. A. 9th Cir. Certiorari denied.

No. 05–9785. Wooden *v.* Eisner. C. A. 3d Cir. Certiorari denied. Reported below: 143 Fed. Appx. 493.

No. 05–9820. Turner, aka Tucker *v.* Woodford, Acting Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied.

No. 05–9850. Beckham *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 919 So. 2d 437.

No. 05–9856. Messer *v.* Zon, Superintendent, Watertown Correctional Facility, et al. C. A. 2d Cir. Certiorari denied.

No. 05–9862. Glawson *v.* Massachusetts. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 445 Mass. 1019, 839 N. E. 2d 822.

No. 05–9878. Ortiz *v.* Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division, et al. C. A. 5th Cir. Certiorari denied.

No. 05–9907. Haynes *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 05–9920. Crout *v.* Washington et al. C. A. 9th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 601.

No. 05–9941. Lakin *v.* Stine, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 431 F. 3d 959.

No. 05–9968. Forte *v.* Rup et al. C. A. 1st Cir. Certiorari denied.

No. 05–9992. Cardenas *v.* O'Connor, Warden, et al. C. A. 11th Cir. Certiorari denied.

No. 05–10055. Rush *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 05–10061. Blount *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 652.

No. 05–10069. Samboy *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 433 F. 3d 154.

No. 05–10071. Collins *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 230.

No. 05–10073. Rangel *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 143 Fed. Appx. 689.

No. 05–10075. Tovar-Herrera *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 773.

No. 05–10081. Reyes *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 05–10082. Smith *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 05–10083. Cannon *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 555.

No. 05–10084. Corbett *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 144 Fed. Appx. 979.

No. 05–10086. King *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 262.

No. 05–10088. Santos Murillo *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 3d 1152.

No. 05–10090. Rodriguez-Calderon *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 05–10092. Poe *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 428 F. 3d 1119.

No. 05–10093. Washington *v.* United States District Court for the Central District of California. C. A. 9th Cir. Certiorari denied.

No. 05–10095. Torres-Rodriguez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 388.

No. 05–10096. Mullen *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 711.

No. 05–10097. Parker *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 452.

No. 05–10100. Gonzalez-Andazola, aka Gonzales *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 715.

No. 05–10101. Garcia *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 870.

No. 05–10105. Ladwig *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 432 F. 3d 1001.

No. 05–10109. **Beaird** *v.* **United States District Court for the Northern District of Texas.** C. A. 5th Cir. Certiorari denied.

No. 05–10110. **Brown** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 38 Fed. Appx. 133.

No. 05–10111. **Restrepo-Mejia** *v.* **United States.** C. A. 11th Cir. Certiorari denied.

No. 05–10112. **Broughton** *v.* **United States.** C. A. 8th Cir. Certiorari denied.

No. 05–10114. **Savage** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 256.

No. 05–10115. **Rich** *v.* **Peterson, Warden.** C. A. 10th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 160.

No. 05–10116. **Ramirez** *v.* **United States.** C. A. 11th Cir. Certiorari denied.

No. 05–10119. **Doss** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 770.

No. 05–10120. **Cherry** *v.* **United States.** C. A. 10th Cir. Certiorari denied. Reported below: 433 F. 3d 698.

No. 05–10122. **Diombera** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 486.

No. 05–10127. **Reynolds** *v.* **United States.** C. A. 11th Cir. Certiorari denied.

No. 05–10129. **Klopf** *v.* **United States.** C. A. 11th Cir. Certiorari denied. Reported below: 423 F. 3d 1228.

No. 05–10130. **McCrimmon** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 3d 454.

No. 05–10132. **Saenz** *v.* **United States.** C. A. 11th Cir. Certiorari denied.

No. 05–10133. **Sylvestre** *v.* **United States.** C. A. 2d Cir. Certiorari denied. Reported below: 170 Fed. Appx. 190.

No. 05–10134. **Reza** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 142 Fed. Appx. 695.

No. 05–10136. WILDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 545.

No. 05–10137. WALKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 504.

No. 05–10140. DUNLAP *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 484.

No. 05–10141. DUCKETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 05–10142. FLORENTINO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 427 F. 3d 985.

No. 05–10145. KEEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 498.

No. 05–10150. SEALS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 170 Fed. Appx. 421.

No. 05–10151. SKANNAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 565.

No. 05–10156. MARTIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 889.

No. 05–10160. WILSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–10163. JOHN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 325.

No. 05–10166. CLEMENT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 499.

No. 05–10168. HERNANDEZ-ANGULO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 966.

No. 05–10169. GOLDEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 716.

No. 05–10171. HEBAH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 678.

No. 05–10174. TODD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 165 Fed. Appx. 99.

No. 05–10176. Thomas *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–10177. Shingler *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 895.

No. 05–10178. Stedeford *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 05–10179. Arroyave Restrepo *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 05–10182. Davis *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 437 F. 3d 989.

No. 05–10185. Puckett *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 422 F. 3d 340.

No. 05–10188. James *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 147 Fed. Appx. 76.

No. 05–10190. Martinez-Melchor *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 401.

No. 05–10192. Byrd *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 313.

No. 05–10196. Palmer *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 05–10197. Warmus *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 783.

No. 05–10198. Coles *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 397.

No. 05–10199. Green *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 435 F. 3d 1265.

No. 05–10205. Fifield *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 432 F. 3d 1056.

No. 05–10206. Halsell *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 05–10209. Estupinan *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–10210. Coffey, aka Murray *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 415 F. 3d 882.

No. 05–10211. DeWilliams *v.* Hobart, Warden. C. A. 7th Cir. Certiorari denied.

No. 05–10212. Davis *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–10216. Rodriguez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 273.

No. 05–10223. Deckard *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 628.

No. 04–10035. Long *v.* Wilson, Superintendent, State Correctional Institution at Cresson. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 393 F. 3d 390.

No. 05–3. Bendolph *v.* United States. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 409 F. 3d 155.

No. 05–817. Guadalupe *v.* United States. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 402 F. 3d 409.

No. 05–821. Herring et al. *v.* United States. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 424 F. 3d 384.

No. 05–827. McMonagle *v.* Credit Suisse (USA), Inc., fka Credit Suisse First Boston (USA), Inc., as Agent for the Prepetition Bank Lenders, et al.; and

No. 05–941. Official Representatives of the Bondholders and Trade Creditors of Debtors Owens Corning et al. *v.* Credit Suisse (USA), Inc., fka Credit Suisse First Boston (USA), Inc., as Agent for the Prepetition Bank Lenders, et al. C. A. 3d Cir. Certiorari denied. The Chief Justice took no part in the consideration or decision of these petitions. Reported below: 419 F. 3d 195.

No. 05–866. Philadelphia Housing Authcrity et al. *v.* McDowell et al. C. A. 3d Cir. Certiorari denied. Justice

ALITO took no part in the consideration or decision of this petition. Reported below: 423 F. 3d 233.

No. 05–9501. KERWIN *v.* BROOKS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 05–10077. THOMAS *v.* WILLIAMSON, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 152 Fed. Appx. 199.

No. 05–10147. MATTHEWS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 150 Fed. Appx. 152.

*Rehearing Denied*

No. 05–799. VISIN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, 546 U. S. 1175;
No. 05–831. SADLOWSKI ET UX. *v.* BENOIT, *ante,* p. 1003;
No. 05–923. BUNTON *v.* BENTLEY, *ante,* p. 1013;
No. 05–8091. BELL *v.* OKLAHOMA, 546 U. S. 1186;
No. 05–8193. HARDESTY *v.* MICHIGAN, 546 U. S. 1188;
No. 05–8384. GLAUDE *v.* BRAZELTON ET AL., *ante,* p. 1006;
No. 05–8423. SABBIA *v.* LOMBARDI, *ante,* p. 1006;
No. 05–8429. IN RE SCOTT, *ante,* p. 1002;
No. 05–8511. COUNTERMAN *v.* UNITED STATES, 546 U. S. 1199; and
No. 05–8898. DUSHAJ *v.* DEPARTMENT OF HOMELAND SECURITY ET AL., *ante,* p. 1044. Petitions for rehearing denied.

No. 05–7523. JEFFREYS *v.* UNITED TECHNOLOGIES CORPORATION, SIKORSKY AIRCRAFT DIVISION, 546 U. S. 1131. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

## MAY 2, 2006

*Miscellaneous Order*

No. 04–1131. WHITMAN *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. 9th Cir. [Certiorari granted, 545 U. S. 1138.]

Counsel are directed to file supplemental briefs addressing the applicability of *Darby* v. *Cisneros,* 509 U. S. 137 (1993), to this case. The briefs, not to exceed 15 pages, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, May 15, 2006. JUSTICE ALITO took no part in the consideration or decision of this order.

MAY 4, 2006

*Miscellaneous Order*

No. 05A991. WILSON *v.* LIVINGSTON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

MAY 10, 2006

*Miscellaneous Order*

No. 05A1002. BHARTI *v.* GONZALES, ATTORNEY GENERAL. Application for stay of removal, presented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of removal.

MAY 15, 2006

*Certiorari Dismissed*

No. 05–9833. KRONCKE *v.* ARIZONA. Ct. App. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders*

No. 05A981. EXXON MOBIL CORP. *v.* GREFER ET AL. Ct. App. La., 4th Cir. Application for stay, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. 05M81. WALLS *v.* ILLINOIS. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 05–983. WINKELMAN, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS WINKELMAN ET UX., ET AL. *v.* PARMA CITY SCHOOL DISTRICT. C. A. 6th Cir. The Solicitor

General is invited to file a brief in this case expressing the views of the United States.

No. 05–1006. Apotex Inc. et al. *v.* Pfizer, Inc. C. A. D. C. Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. The Chief Justice took no part in the consideration or decision of this order.

No. 05–1447. Christian Civic League of Maine, Inc. *v.* Federal Election Commission et al. Appeal from C. A. D. C. Cir. Motion of appellant to expedite consideration of the appeal and to consolidate briefing denied.

No. 05–8562. Dixon *v.* City of Minneapolis, Minnesota, et al. C. A. 8th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1016] denied.

No. 05–8851. Phelps et ux. *v.* Jones, dba J&J Construction, et al. C. A. 6th Cir. Motion of petitioners for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1039] denied.

No. 05–10276. In re Hammond;
No. 05–10402. In re Kelly;
No. 05–10453. In re Miles;
No. 05–10487. In re Segars; and
No. 05–10507. In re Abdullah. Petitions for writs of habeas corpus denied.

No. 05–10505. In re Boyce. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 05–9938. In re Haynes; and
No. 05–10310. In re Mitchell. Petitions for writs of mandamus denied.

No. 05–9538. In re Jones. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

*Certiorari Granted*

No. 05–593. Osborn *v.* Haley et al. C. A. 6th Cir. Certiorari granted. In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: "Whether the Court of Appeals had jurisdiction to review the District Court's remand order, notwithstanding 28 U. S. C. § 1447(d)?" Reported below: 422 F. 3d 359.

No. 05–595. Whorton, Director, Nevada Department of Corrections *v.* Bockting. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 399 F. 3d 1010 and 408 F. 3d 1127.

No. 05–746. Norfolk Southern Railway Co. *v.* Sorrell. Ct. App. Mo., Eastern Dist. Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 170 S. W. 3d 35.

No. 05–848. Environmental Defense et al. *v.* Duke Energy Corp. et al. C. A. 4th Cir. Certiorari granted. Reported below: 411 F. 3d 539.

*Certiorari Denied*

No. 05–8. Snavely *v.* Miller. C. A. 9th Cir. Certiorari denied. Reported below: 124 Fed. Appx. 495.

No. 05–454. Cox *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 973.

No. 05–804. Valentine *v.* Woodford, Acting Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied. Reported below: 143 Fed. Appx. 782.

No. 05–826. Pierce *v.* Jeter, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 344.

No. 05–849. Elia *v.* Gonzales, Attorney General. C. A. 6th Cir. Certiorari denied. Reported below: 431 F. 3d 268.

No. 05–852. Khurana *v.* Gonzales, Attorney General. C. A. 9th Cir. Certiorari denied. Reported below: 134 Fed. Appx. 147.

No. 05–918. Hitachi High Technologies America, Inc. *v.* United States et al. C. A. Fed. Cir. Certiorari denied. Reported below: 139 Fed. Appx. 264.

No. 05–927. National Federation of the Blind et al. *v.* Federal Trade Commission. C. A. 4th Cir. Certiorari denied. Reported below: 420 F. 3d 331.

No. 05–959. Caley et al. *v.* Gulfstream Aerospace Corp. et al. C. A. 11th Cir. Certiorari denied. Reported below: 428 F. 3d 1359.

No. 05–963. International Rectifier Corp. *v.* Samsung Electronics Co., Ltd., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 424 F. 3d 1235.

No. 05–977. Briscoe et al. *v.* Potter, Postmaster General, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 171 Fed. Appx. 850.

No. 05–978. United States *v.* Pataki, Governor of New York, et al.; and
No. 05–982. Cayuga Indian Nation of New York et al. *v.* Pataki, Governor of New York, et al. C. A. 2d Cir. Certiorari denied. Reported below: 413 F. 3d 266.

No. 05–986. Renesas Technology America, Inc. *v.* United States et al. C. A. Fed. Cir. Certiorari denied. Reported below: 140 Fed. Appx. 943.

No. 05–990. Richmond *v.* Potter, Postmaster General, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 171 Fed. Appx. 851.

No. 05–991. Sanai et al. *v.* Sanai et al. C. A. 9th Cir. Certiorari denied. Reported below: 141 Fed. Appx. 677.

No. 05–1018. Johal *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 3d 823.

No. 05–1108. Simon *v.* Office of Disciplinary Counsel. Sup. Ct. La. Certiorari denied. Reported below: 913 So. 2d 816.

No. 05–1113. XLP Corp. et al. *v.* Lake County, Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 359 Ill. App. 3d 239, 832 N. E. 2d 480.

No. 05–1118. Crogan et al. *v.* Chaker. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 3d 1215.

No. 05–1129. Jorg et al. *v.* Estate of Owensby. C. A. 6th Cir. Certiorari denied. Reported below: 414 F. 3d 596.

No. 05–1131. Green *v.* Elixir Industries, Inc. C. A. 11th Cir. Certiorari denied. Reported below: 152 Fed. Appx. 838.

No. 05–1132. Murray *v.* Butler, Individually and as Mayor of Marion, Illinois, et al. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 355 Ill. App. 3d 1208, 885 N. E. 2d 589.

No. 05–1133. Canadian River Land & Cattle, Inc., et al. *v.* West Plains Grain, Inc., dba Amigo Feeders. Ct. Civ. App. Okla. Certiorari denied.

No. 05–1145. Bryte, Personal Representative of the Estate of Bryte, Deceased, et al. *v.* American Household, Inc., fka Sunbeam Corp., et al. C. A. 4th Cir. Certiorari denied. Reported below: 429 F. 3d 469.

No. 05–1147. Dawson *v.* Newman, Judge, Superior Court of Indiana, Madison County. C. A. 7th Cir. Certiorari denied. Reported below: 419 F. 3d 656.

No. 05–1149. Fraternal Order of Police, North Dakota State Lodge, et al. *v.* Stenehjem, Attorney General of North Dakota. C. A. 8th Cir. Certiorari denied. Reported below: 431 F. 3d 591.

No. 05–1150. duPont *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 860 A. 2d 525.

No. 05–1151. Mitrano *v.* Warshell et al. C. A. 1st Cir. Certiorari denied.

No. 05–1153. Hopkins *v.* Godfather's Pizza, Inc., et al. C. A. 7th Cir. Certiorari denied. Reported below: 141 Fed. Appx. 473.

No. 05–1154. Hopkins *v.* State Farm Mutual Automobile Insurance Co. et al. C. A. 7th Cir. Certiorari denied. Reported below: 139 Fed. Appx. 756.

No. 05–1161. Gelb *v.* New York City Board of Elections et al. C. A. 2d Cir. Certiorari denied. Reported below: 155 Fed. Appx. 12.

No. 05–1164. TROYER ET UX. *v.* BOOMTOWN LLC OF DELAWARE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 253.

No. 05–1166. ALLY *v.* GRAVER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 128 Fed. Appx. 194.

No. 05–1172. GONZALEZ *v.* BMG MUSIC ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 430 F. 3d 888.

No. 05–1188. MORETON ROLLESTON, JR., LIVING TRUST *v.* ESTATE OF SIMS. Sup. Ct. Ga. Certiorari denied. Reported below: 280 Ga. 32, 622 S. E. 2d 849.

No. 05–1190. SMITH *v.* OREGON DEPARTMENT OF REVENUE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 140 Fed. Appx. 749.

No. 05–1197. WRAY *v.* JOHNSON, TRUSTEE OF THE HOYT SIBLEY AND MARY SIBLEY 1973 TRUST. Sup. Ct. Nev. Certiorari denied. Reported below: 121 Nev. 1137, 152 P. 3d 777.

No. 05–1203. CARTY *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 426 F. 3d 1064 and 431 F. 3d 1185.

No. 05–1218. SMITH *v.* BAZZEL, CLERK, CIRCUIT COURT OF FLORIDA, BAY COUNTY, ET AL. C. A. 11th Cir. Certiorari denied.

No. 05–1220. SHAW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 863.

No. 05–1226. COX ET AL. *v.* CITY OF DALLAS, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 430 F. 3d 734.

No. 05–1229. WILD RICE RIVER ESTATES, INC. *v.* CITY OF FARGO, NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 705 N. W. 2d 850.

No. 05–1235. PONY LAKE SCHOOL DISTRICT 30, ROCK COUNTY, BASSETT, NEBRASKA, ET AL. *v.* STATE COMMITTEE FOR THE REORGANIZATION OF SCHOOL DISTRICTS ET AL. Sup. Ct. Neb. Certiorari denied. Reported below: 271 Neb. 173, 710 N. W. 2d 609.

No. 05–1252. HOBLEY *v.* KENTUCKY FRIED CHICKEN, INC. C. A. D. C. Cir. Certiorari denied. Reported below: 168 Fed. Appx. 443.

No. 05–1262. FEDOROV *v.* BLOOMBERG, MAYOR OF THE CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 05–1277. HAMPTON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 919 So. 2d 949.

No. 05–1293. RIBAUDO *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 62 M. J. 286.

No. 05–1301. DELLA ROSE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 435 F. 3d 735.

No. 05–1308. BUTLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 429 F. 3d 140.

No. 05–1310. ELSO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 422 F. 3d 1305.

No. 05–1317. GAINES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 05–1319. RODRIGUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 05–5650. VEGA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 05–6979. BOWEN *v.* CHESNEY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT RETREAT. C. A. 3d Cir. Certiorari denied.

No. 05–7620. BEN-SCHOTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 05–8222. CHAO XIONG ZHANG *v.* GEORGIA. Ct. App. Ga. Certiorari denied.

No. 05–8319. SEARS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 411 F. 3d 1124.

No. 05–8395. DAVIS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 356 Ill. App. 3d 940, 827 N. E. 2d 518.

No. 05–8559. ENTLER *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 05–8593. Ford *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 954.

No. 05–8633. Massey *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 419 F. 3d 1008.

No. 05–8657. Bourgeois *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 423 F. 3d 501.

No. 05–8701. Summerville *v.* Local 77 et al. C. A. 4th Cir. Certiorari denied. Reported below: 142 Fed. Appx. 762.

No. 05–8902. Garza *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 756.

No. 05–9023. Jenkins *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 229 Fed. Appx. 362.

No. 05–9330. Adkins *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 930 So. 2d 524.

No. 05–9516. Price *v.* Crestar Securities Corp. et al. C. A. D. C. Cir. Certiorari denied.

No. 05–9520. Montgomery, aka Harris *v.* Florida. C. A. 11th Cir. Certiorari denied.

No. 05–9524. Allen *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 913 So. 2d 788.

No. 05–9525. Berry *v.* Luecken-Berry. Super. Ct. N. J., App. Div. Certiorari denied.

No. 05–9526. Alexander *v.* Nevada. Sup. Ct. Nev. Certiorari denied. Reported below: 121 Nev. 1100, 152 P. 3d 745.

No. 05–9530. Toussaint *v.* McDonough, Interim Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 05–9533. Pfeil *v.* Texas (two judgments). Ct. Crim. App. Tex. Certiorari denied.

No. 05–9541. Kenyon *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 05–9545. Mann *v.* Cathel, Administrator, New Jersey State Prison, et al. C. A. 3d Cir. Certiorari denied.

No. 05–9548. Sapp *v.* South Carolina. Sup. Ct. S. C. Certiorari denied. Reported below: 366 S. C. 283, 621 S. E. 2d 883.

No. 05–9552. Michael *v.* McDonough, Interim Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 430 F. 3d 1310.

No. 05–9559. Fox *v.* Yukins, Warden, et al. C. A. 6th Cir. Certiorari denied.

No. 05–9562. Irizarry *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 05–9568. Haught *v.* West Virginia. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 218 W. Va. 462, 624 S. E. 2d 899.

No. 05–9569. Coker *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 343 Ill. App. 3d 1284, 856 N. E. 2d 687.

No. 05–9573. Strickland *v.* Rickman et al. C. A. 11th Cir. Certiorari denied. Reported below: 136 Fed. Appx. 303.

No. 05–9584. Merritt *v.* Jones, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–9591. Baugh *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 358 Ill. App. 3d 718, 832 N. E. 2d 903.

No. 05–9594. Wallace *v.* Parker, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–9597. Wallin *v.* Mays-Wallin. Ct. App. Colo. Certiorari denied.

No. 05–9599. Warner *v.* Texas (two judgments). Ct. Crim. App. Tex. Certiorari denied.

No. 05–9601. Breedlove *v.* Sirmons, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 148 Fed. Appx. 728.

No. 05–9606. Salar *v.* City of Mesa Police Department et al. Ct. App. Ariz. Certiorari denied.

No. 05–9614. HALL *v.* McDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 05–9615. PICKETT *v.* McCLINTOCK, DEPUTY FEDERAL DEFENDER. C. A. 9th Cir. Certiorari denied.

No. 05–9618. MORGAN *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 357 Ill. App. 3d 1106, 895 N. E. 2d 703.

No. 05–9619. HALL *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 270 Neb. 669, 708 N. W. 2d 209.

No. 05–9623. KENYATTA *v.* WOODFORD, ACTING SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 152 Fed. Appx. 616.

No. 05–9626. THORPE *v.* OHIO. C. A. 6th Cir. Certiorari denied.

No. 05–9629. JOHNSON *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 05–9641. BLAKE *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 121 Nev. 779, 121 P. 3d 567.

No. 05–9642. HENDERSON *v.* ADDISON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 688.

No. 05–9643. BAKER *v.* COTO ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 854.

No. 05–9647. BUNTON *v.* KREUZER, SHERIFF, CHAMBERS COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 629.

No. 05–9652. MINNFEE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 05–9653. HERRON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVIsion. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 603.

No. 05–9654. Still *v.* Crawford et al. C. A. 8th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 241.

No. 05–9656. Weems *v.* Texas. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 167 S. W. 3d 350.

No. 05–9659. Dornheim *v.* Sholes et al. C. A. 8th Cir. Certiorari denied. Reported below: 430 F. 3d 919.

No. 05–9664. McCann *v.* City of Lincoln, Illinois. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 355 Ill. App. 3d 1204, 885 N. E. 2d 587.

No. 05–9666. Johnson *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 913 So. 2d 1258.

No. 05–9667. Richardson *v.* Louisiana. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 896 So. 2d 257.

No. 05–9669. Wiley *v.* Pierce, Warden. C. A. 7th Cir. Certiorari denied.

No. 05–9670. Turner *v.* Iglecia. C. A. 4th Cir. Certiorari denied. Reported below: 145 Fed. Appx. 418.

No. 05–9673. Zink *v.* Missouri. Sup. Ct. Mo. Certiorari denied. Reported below: 181 S. W. 3d 66.

No. 05–9680. Lane-El *v.* Knight. C. A. 7th Cir. Certiorari denied.

No. 05–9683. Guzman *v.* Runnels, Warden. C. A. 9th Cir. Certiorari denied.

No. 05–9694. Favreau *v.* Favreau. Sup. Ct. Fla. Certiorari denied. Reported below: 908 So. 2d 1057.

No. 05–9696. McKennie *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 354 Ill. App. 3d 1161, 883 N. E. 2d 1149.

No. 05–9697. Forbes et ux. *v.* New Century Mortgage Corp. et al. C. A. 5th Cir. Certiorari denied. Reported below: 144 Fed. Appx. 416.

No. 05–9707. SEABORN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 05–9710. PINA *v.* KIRKLAND, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–9711. HILL *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 05–9719. LEE *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied.

No. 05–9730. LEDESMA AGUILAR *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 3d 526.

No. 05–9732. ATAMIAN *v.* VATTILANA. Sup. Ct. Del. Certiorari denied. Reported below: 889 A. 2d 283.

No. 05–9734. GREENE *v.* FINGER LAKES DEVELOPMENTAL DISABILITIES OFFICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 136 Fed. Appx. 441.

No. 05–9736. SPLAWN *v.* TEXAS. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 160 S. W. 3d 103.

No. 05–9740. RANDOLPH *v.* FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 905 So. 2d 895.

No. 05–9741. MUHAMMAD *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 269 Va. 451, 619 S. E. 2d 16.

No. 05–9758. MILLER *v.* MILLER-STOUT, SUPERINTENDENT, AIRWAY HEIGHTS CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied.

No. 05–9774. EDWARDS *v.* PRUNTY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–9775. CUNNINGHAM *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 05–9799. RENFROE *v.* PLILER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 168 Fed. Appx. 763.

No. 05–9815. AYAZI *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 2d Cir. Certiorari denied. Reported below: 147 Fed. Appx. 202.

No. 05–9824. WHITE *v.* ENDICOTT, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 05–9830. NOONER *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 402 F. 3d 801.

No. 05–9873. EVERS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 917 So. 2d 193.

No. 05–9881. GARCIA-MORIEL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 05–9885. BINGMAN *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 329 Mont. 151, 122 P. 3d 1235.

No. 05–9889. WILLS *v.* HAINES. C. A. 8th Cir. Certiorari denied.

No. 05–9898. RAMAZZINI *v.* KIRKLAND, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 811.

No. 05–9904. HUGHES *v.* ILLINOIS DEPARTMENT OF CORRECTIONS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 357 Ill. App. 3d 1100, 895 N. E. 2d 701.

No. 05–9912. GAMO ET AL. *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 784.

No. 05–9931. ROCHA *v.* PRICE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 932.

No. 05–9932. FAUNTLEROY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 05–9950. VANREES *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 125 P. 3d 403.

No. 05–9984. STEWART *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 05–9999. Hendley *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 923 So. 2d 1162.

No. 05–10034. Haynes *v.* Florida. C. A. 11th Cir. Certiorari denied.

No. 05–10037. Yarbrough *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 872 A. 2d 1277.

No. 05–10042. Barker *v.* Spalding, Superintendent, Monroe Correctional Complex. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 3d 1085.

No. 05–10046. Ash-Shahid, fka Nance *v.* Kansas. Ct. App. Kan. Certiorari denied. Reported below: 34 Kan. App. 2d xi, 122 P. 3d 420.

No. 05–10058. Martinez *v.* Ryan, Warden. C. A. 9th Cir. Certiorari denied.

No. 05–10060. Poindexter *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. Reported below: 132 Fed. Appx. 919.

No. 05–10063. Burton *v.* Greene, Superintendent, Great Meadow Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 162 Fed. Appx. 43.

No. 05–10076. Terry *v.* Oregon. 6th Jud. Dist. Cir. Ct. Umatilla County, Ore. Certiorari denied.

No. 05–10125. Schulpius *v.* Wisconsin. Sup. Ct. Wis. Certiorari denied. Reported below: 287 Wis. 2d 44, 707 N. W. 2d 495.

No. 05–10128. Spivey *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 05–10180. Chayoon *v.* Sherlock et al. App. Ct. Conn. Certiorari denied. Reported below: 89 Conn. App. 821, 877 A. 2d 4.

No. 05–10184. Cuero *v.* McFadden, Warden, et al. C. A. 11th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 755.

No. 05–10225. Patterson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 3d 832.

No. 05–10227. Santos-Rodriguez *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 433 F. 3d 128.

No. 05–10228. Christopher *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 818.

No. 05–10230. Chavarria *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 306.

No. 05–10234. Kyle *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 294.

No. 05–10239. Davis *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 300.

No. 05–10241. Mesina *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 144 Fed. Appx. 844.

No. 05–10242. Jourdain *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 433 F. 3d 652.

No. 05–10244. Salamanca-Sanchez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 645.

No. 05–10248. Tome *v.* Folino, Superintendent, State Correctional Institution at Greene, et al. C. A. 3d Cir. Certiorari denied. Reported below: 167 Fed. Appx. 320.

No. 05–10249. Torres *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 496.

No. 05–10250. Yemitan *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 05–10251. Reyna *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 436 F. 3d 560.

No. 05–10259. Perry *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 438 F. 3d 642.

No. 05–10264. Wright *v.* Lamanna, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 457.

No. 05–10271. Howell *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–10273. FRANDSEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–10279. LAMKIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 214.

No. 05–10280. CARLISLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–10281. BEGAYE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 669.

No. 05–10286. ADDISON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–10287. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 05–10289. SALAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 691.

No. 05–10290. RIDDICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 407.

No. 05–10291. CANCEL-SIERRA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 05–10297. MALDONADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 759.

No. 05–10298. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–10301. ORTEGA-BALDERAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 614.

No. 05–10305. BARUT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 Fed. Appx. 533.

No. 05–10308. BARTZ *v.* GRAMS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 05–10316. HILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 203.

No. 05–10317. HULL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 419 F. 3d 762.

No. 05–10320. HOMRICH *v.* VEACH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 05–10323. MCKINNEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 820.

No. 05–10326. CIFUENTES-CAYCEDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 355.

No. 05–10329. MATTHEWS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 379.

No. 05–10330. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 343.

No. 05–10331. JORDAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 435 F. 3d 693.

No. 05–10332. JONES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 423 F. 3d 1164.

No. 05–10334. TEEPLES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 432 F. 3d 1110.

No. 05–10335. WORTHY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 922.

No. 05–10336. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–10338. ALLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 05–10342. DECKARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 05–10351. PITTS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 924.

No. 05–10353. PRATT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 438 F. 3d 1264.

No. 05–10354. JUAN-SEBASTIAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 786.

No. 05–10356. KAPLAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 05–10358. Rogers *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 975.

No. 05–10359. Sutton *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 05–10361. Ramirez *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 05–10364. Weaver *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 433 F. 3d 1104.

No. 05–10370. Gallo *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–10379. Ferguson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 144 Fed. Appx. 976.

No. 05–10383. Gomez-Martinez *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 05–10387. Clark *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 434 F. 3d 684.

No. 05–10393. Moreland *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 437 F. 3d 424.

No. 05–10394. Munoz Lopez *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 431 F. 3d 313.

No. 05–10403. Dobbs *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 242.

No. 05–10410. Walton *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 694.

No. 05–10412. Vongkaysone *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 434 F. 3d 68.

No. 05–10413. Lowery *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 161 Fed. Appx. 226.

No. 05–10414. Krankel *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 05–10416. Gilart *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 880.

No. 05–10420. Hernandez *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 05–10421. Hairston *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 451.

No. 05–10427. Cancel-Ruiz *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 05–879. Tachiona, on Her Own Behalf and on Behalf of Her Late Husband Tachiona, et al. *v.* United States. C. A. 2d Cir. Certiorari denied. The Chief Justice took no part in the consideration or decision of this petition. Reported below: 386 F. 3d 205.

No. 05–970. Banner et al. *v.* United States et al. C. A. D. C. Cir. Certiorari denied. The Chief Justice took no part in the consideration or decision of this petition. Reported below: 428 F. 3d 303.

No. 05–974. Britain *v.* Carvin. Sup. Ct. Wash. Motion of petitioner to join additional party denied. Certiorari denied. Reported below: 155 Wash. 2d 679, 122 P. 3d 161.

No. 05–1152. United States *v.* Nielson. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 415 F. 3d 1195.

No. 05–1184. Alliance of Automobile Manufacturers *v.* Gwadosky, Secretary of State of Maine, et al. C. A. 1st Cir. Certiorari denied. The Chief Justice took no part in the consideration or decision of this petition. Reported below: 430 F. 3d 30.

No. 05–1306. Extreme Associates, Inc., et al. *v.* United States. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 431 F. 3d 150.

No. 05–9181. Marshall *v.* McDonough, Interim Secretary, Florida Department of Corrections. Sup. Ct. Fla. Certiorari denied. Justice Breyer would grant the petition for writ of certiorari. Reported below: 911 So. 2d 1129.

No. 05–9794. Carter *v.* White, Warden, et al. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 152 Fed. Appx. 111.

No. 05–9849. BAEZ *v.* PALAKOVICH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SMITHFIELD, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 05–9973. SANCHEZ, AKA MOLINO *v.* TENNIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 05–10277. FITZGERALD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 05–10349. COCCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 05–10415. HEDGEPETH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 434 F. 3d 609.

*Rehearing Denied*

No. 05–847. SINA ET UX. *v.* MABLEY ET AL., *ante*, p. 1019;
No. 05–901. BRUENN *v.* NORTHROP GRUMMAN CORP. ET AL., *ante*, p. 1040;
No. 05–6971. DUKES *v.* UNITED STATES, 546 U. S. 1177;
No. 05–7252. LEECH *v.* ANDREWS ET AL., *ante*, p. 1022;
No. 05–7701. THOMAS *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 546 U. S. 1152;
No. 05–7733. WATSON *v.* KNOWLES, WARDEN, ET AL., 546 U. S. 1178;
No. 05–8016. BOWMAN *v.* BOWMAN, 546 U. S. 1184;
No. 05–8254. LOWE *v.* SHAH ET AL., 546 U. S. 1189;
No. 05–8420. MATLOCK *v.* KNOWLES, WARDEN, ET AL., 546 U. S. 1196;
No. 05–8421. JONES *v.* MICHIGAN, *ante*, p. 1006;
No. 05–8456. TAPP *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, 546 U. S. 1197;
No. 05–8465. IN RE TIDWELL, 546 U. S. 1167;

No. 05–8487. In re Moreno Valencia, 546 U. S. 1167;
No. 05–8524. In re Vargas, 546 U. S. 1168;
No. 05–8525. In re Cuero Hurtado, 546 U. S. 1168;
No. 05–8528. In re Campaz Hurtado, 546 U. S. 1168;
No. 05–8757. Andrews *v.* Gonzales, Attorney General, et al., *ante,* p. 1043;
No. 05–8834. In re Bangura, *ante,* p. 1039;
No. 05–9133. Alexis *v.* United States, *ante,* p. 1012;
No. 05–9157. In re Beaver, *ante,* p. 1039; and
No. 05–9337. In re Caicedo Vargas, *ante,* p. 1017. Petitions for rehearing denied.

No. 05–8059. Watkins *v.* United States et al., 546 U. S. 1129. Petition for rehearing denied. Justice Alito took no part in the consideration or decision of this petition.

No. 04–6059. Spurlock *v.* Army Corps of Engineers, 543 U. S. 937. Motion for leave to file petition for rehearing denied.

## May 17, 2006

### *Miscellaneous Order*

No. 05A1054. Herron *v.* Texas. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied.

## May 22, 2006

### *Certiorari Granted—Vacated and Remanded*

No. 05–912. Estate of Lowe, by Harris, Cook County Public Guardian and Supervised Administrator *v.* Apex Tax Investments, Inc., et al. Sup. Ct. Ill. Motion of Mental Health Association in Illinois et al. for leave to file a brief as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Jones* v. *Flowers, ante,* p. 220. Reported below: 217 Ill. 2d 1, 838 N. E. 2d 907.

### *Certiorari Dismissed*

No. 05–9806. Goldwater *v.* Freigo. Sup. Ct. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

*Miscellaneous Orders*

No. 05M82. GOSSAGE *v.* WASHINGTON ET AL. Motion of petitioner for leave to proceed as a veteran granted.

No. 05–1284. WATSON ET AL. *v.* PHILIP MORRIS COS., INC., ET AL. C. A. 8th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 05–8820. LAWRENCE *v.* FLORIDA. C. A. 11th Cir. [Certiorari granted, *ante*, p. 1039.] Motion of petitioner for appointment of counsel granted. Mary C. Bonner, Esq., of Ft. Lauderdale, Fla., is appointed to serve as counsel for petitioner in this case.

No. 05–8857. IN RE DIXON. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1039] denied.

No. 05–10650. IN RE MILLER. Petition for writ of habeas corpus denied.

No. 05–1217. IN RE LYNCH;
No. 05–9791. IN RE DONALSON; and
No. 05–9868. IN RE HOWES. Petitions for writs of mandamus denied.

No. 05–10503. IN RE BARNETT. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

*Certiorari Denied*

No. 04–1407. Cuno et al. *v.* DaimlerChrysler Corp. et al. C. A. 6th Cir. Certiorari denied. Reported below: 386 F. 3d 738.

No. 05–731. Pereira, as Trustee of Trace International Holdings, Inc., et al. *v.* Farace et al. C. A. 2d Cir. Certiorari denied. Reported below: 413 F. 3d 330.

No. 05–893. Star-Glo Associates, L. P., et al. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 414 F. 3d 1349.

No. 05–979. Freiburger *v.* South Carolina. Sup. Ct. S. C. Certiorari denied. Reported below: 366 S. C. 125, 620 S. E. 2d 737.

No. 05–1023. Taylor *v.* Federal Express Corp. C. A. 4th Cir. Certiorari denied. Reported below: 429 F. 3d 461.

No. 05–1025. Crete *v.* City of Lowell, Massachusetts, et al. C. A. 1st Cir. Certiorari denied. Reported below: 418 F. 3d 54.

No. 05–1036. Abdur'Rahman *v.* Bredesen et al. Sup. Ct. Tenn. Certiorari denied. Reported below: 181 S. W. 3d 292.

No. 05–1044. Sylvester *v.* LeBovidge, Commissioner, Massachusetts Department of Revenue, et al. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 445 Mass. 304, 837 N. E. 2d 662.

No. 05–1050. Norman et al. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 429 F. 3d 1081.

No. 05–1053. Greater Atlanta Home Builders Assn., Inc., et al. *v.* City of Atlanta, Georgia. C. A. 11th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 846.

No. 05–1189. Salinas et al. *v.* Lamere et al. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied. Reported below: 131 Cal. App. 4th 1059, 31 Cal. Rptr. 3d 880.

No. 05–1192. QLT, Inc., fka QLT Phototherapeutics, Inc. *v.* Massachusetts Eye and Ear Infirmary. C. A. 1st Cir. Certiorari denied. Reported below: 412 F. 3d 215.

No. 05–1195. PHOENIX LITHOGRAPHING CORP. *v.* PRESTIGE ASSOCIATES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 143 Fed. Appx. 486.

No. 05–1196. JARMUTH *v.* CULPEPPER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 148 Fed. Appx. 188.

No. 05–1199. STREET ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI ET AL. (two judgments). C. A. 5th Cir. Certiorari denied.

No. 05–1200. MOLER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 05–1202. MYERS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 839 N. E. 2d 1154.

No. 05–1205. LUCERO, DBA A&N QUALITY PRODUCTS, ET AL. *v.* BURT BUICK-PONTIAC-GMC TRUCK, INC., DBA BURT CUSTOM FINANCE, DBA BURT AUTOMOTIVE NETWORK, INC., ET AL. Ct. App. Colo. Certiorari denied.

No. 05–1207. REAVES *v.* REAVES. Ct. App. S. C. Certiorari denied.

No. 05–1208. GUTHRIE *v.* CITY OF SCOTTSDALE, ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 987.

No. 05–1212. GRIMM *v.* GRIMM. Sup. Ct. Conn. Certiorari denied. Reported below: 276 Conn. 377, 886 A. 2d 391.

No. 05–1213. WILBANKS *v.* WILBANKS. Ct. Civ. App. Okla. Certiorari denied.

No. 05–1214. EPPERSON ET AL. *v.* ENTERTAINMENT EXPRESS, INC., NKA TICKETS.COM, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 159 Fed. Appx. 249.

No. 05–1216. STAUDENMAIER *v.* NELLIE MAE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 215.

No. 05–1219. D'AGOSTINO *v.* BUDGE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 456.

No. 05–1227. COLUCCI *v.* AGFA CORPORATION SEVERANCE PAY PLAN. C. A. 4th Cir. Certiorari denied. Reported below: 431 F. 3d 170.

No. 05–1237. Hutchins *v.* Myers. C. A. 6th Cir. Certiorari denied. Reported below: 422 F. 3d 347.

No. 05–1245. Hamm *v.* Committee on Character and Fitness of the Supreme Court of Arizona. Sup. Ct. Ariz. Certiorari denied. Reported below: 211 Ariz. 458, 123 P. 3d 652.

No. 05–1258. Nichols *v.* Michigan. Cir. Ct. Kalamazoo County, Mich. Certiorari denied.

No. 05–1282. Studio 2000 USA, Inc. *v.* United States Trustee et al. C. A. 9th Cir. Certiorari denied. Reported below: 141 Fed. Appx. 684.

No. 05–1313. Sharon S. *v.* Annette F. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 05–1328. Munoz *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 430 F. 3d 1357.

No. 05–1340. Pacheco *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 434 F. 3d 106.

No. 05–8179. Hunter *v.* Texas. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 148 S. W. 3d 526.

No. 05–8271. Vinning-El *v.* Hulick, Acting Warden. C. A. 7th Cir. Certiorari denied.

No. 05–8571. Schwartz *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 05–8678. Mujahid *v.* Daniels, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 413 F. 3d 991.

No. 05–8929. Smith *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 423 F. 3d 25.

No. 05–9323. Pilley *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 930 So. 2d 550.

No. 05–9610. Aguilar-Delgado, aka Villagomez *v.* United States; Pena-Garza *v.* United States; Fuentes-Anaya *v.* United States; Rodriguez-Aparizio *v.* United States; Theus *v.* United States; Manuel-Montesinos *v.* United States; Sierra-Garcia *v.* United States; and Quevedo-Alvarez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 775 (fourth judgment) and 781 (fifth judgment); 158 Fed. Appx. 547 (second judgment), 565 (first judgment), and 576 (third judgment); 159 Fed. Appx. 596 (sixth judgment); 161 Fed. Appx. 386 (eighth judgment); 166 Fed. Appx. 708 (seventh judgment).

No. 05–9713. CABALLERO-MARTINEZ *v.* UNITED STATES; BARBER *v.* UNITED STATES; and GALLEGOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 556 (first judgment); 160 Fed. Appx. 389 (second judgment); 161 Fed. Appx. 375 (third judgment).

No. 05–9725. QUINLIVAN *v.* MARIN COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 79.

No. 05–9726. ROBERSON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 05–9727. QUARTERMAN *v.* HOLMES ET AL. C. A. 11th Cir. Certiorari denied.

No. 05–9745. THOMAS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 05–9746. WASHINGTON *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 05–9747. WHITE *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 05–9750. WILLIAMS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 895 So. 2d 1287.

No. 05–9751. WILSON *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 05–9756. FRANCIS *v.* WOODFORD, ACTING SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL. C. A. 9th Cir. Certiorari denied.

No. 05–9759. MCGHEE *v.* WALKER, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 05–9761. Jehmlich *v.* Michigan. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 05–9763. Cromwell *v.* Arizona. Sup. Ct. Ariz. Certiorari denied. Reported below: 211 Ariz. 181, 119 P. 3d 448.

No. 05–9771. Campbell *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 05–9773. Dai Nguyen *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 05–9776. Arana Enriquez *v.* Runnels, Warden. C. A. 9th Cir. Certiorari denied.

No. 05–9778. Cooper *v.* Boyette, Correctional Administrator I, Nash Correctional Institution. C. A. 4th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 229.

No. 05–9784. Turner-El *v.* Fienerman et al. C. A. 7th Cir. Certiorari denied.

No. 05–9789. Yero *v.* McDonough, Interim Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 05–9793. Garcia *v.* Birkett, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–9796. English *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 916 So. 2d 1042.

No. 05–9812. Baston *v.* Bagley, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 420 F. 3d 632.

No. 05–9813. Brooks *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 918 So. 2d 181.

No. 05–9823. Green *v.* Johnson, Director, Virginia Department of Corrections, et al. C. A. 4th Cir. Certiorari denied. Reported below: 144 Fed. Appx. 307.

No. 05–9825. McNeal *v.* Morgan, Superintendent, Washington State Penitentiary. C. A. 9th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 890.

No. 05–9845. STUBBS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 876 A. 2d 470.

No. 05–9857. BRADFORD *v.* TOWNSHIP OF UNION PUBLIC SCHOOLS ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 05–9861. DEPALMA *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari denied. Reported below: 5 Misc. 3d 129, 798 N. Y. S. 2d 712.

No. 05–9867. FLEEGLE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 20 App. Div. 3d 684, 798 N. Y. S. 2d 224.

No. 05–9870. GATES *v.* MAHONE ET AL. C. A. 11th Cir. Certiorari denied.

No. 05–9871. FLORES *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 177 S. W. 3d 8.

No. 05–9872. PATEL *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 05–9874. GILLESPIE *v.* MILLER, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 05–9875. DELEON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 05–9880. MORGAN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 166 Md. App. 772.

No. 05–9884. KANDEKORE *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 929 So. 2d 1054.

No. 05–9888. FAIN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 05–9890. WILLIAMS *v.* WILSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 342.

No. 05–9892. HANN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 05–9894. TALBOTT *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. C. A. 9th Cir. Certiorari denied.

No. 05–9911. HARVEY *v.* BUSS, SUPERINTENDENT, WESTVILLE CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 509.

No. 05–9957. PHILLIPS *v.* UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. Reported below: 168 Fed. Appx. 451.

No. 05–9975. SILVERBURG *v.* WEBB, WARDEN. Sup. Ct. Ky. Certiorari denied.

No. 05–9994. FLORES *v.* DEPARTMENT OF JUSTICE. C. A. D. C. Cir. Certiorari denied.

No. 05–10001. HANN *v.* STATE TREASURER. Ct. App. Mich. Certiorari denied.

No. 05–10003. HELM *v.* FLORIDA; and HELM *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 914 So. 2d 938 (second judgment) and 953 (first judgment).

No. 05–10028. LEPISCOPO *v.* FARBER, ATTORNEY GENERAL OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 05–10057. LABOONE *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 679.

No. 05–10079. WIMBUSH *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 05–10080. REVERE *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 05–10089. ROBERTSON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 667.

No. 05–10103. NELSON *v.* MICHIGAN. Cir. Ct. Kent County, Mich. Certiorari denied.

No. 05–10104. KUESIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 05–10107. TOODLE *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 10th Cir. Certiorari denied.

No. 05–10117. RUSH *v.* KANSAS. C. A. 10th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 742.

No. 05–10135. SHERRELL *v.* HOWERTON, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 05–10159. AULTMAN *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 141 Fed. Appx. 216.

No. 05–10162. KEEN *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 05–10167. CRESPIN *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 05–10194. KENNEDY *v.* SMITH ET AL. C. A. 6th Cir. Certiorari denied.

No. 05–10218. WEST *v.* STOUFFER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 203.

No. 05–10221. BIRKS *v.* SPENCER, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied.

No. 05–10237. WISHART *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 171.

No. 05–10254. COCHRAN *v.* RAYTHEON AIRCRAFT CO. C. A. 10th Cir. Certiorari denied. Reported below: 167 Fed. Appx. 7.

No. 05–10285. BLAY *v.* ESTEP, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 804.

No. 05–10295. DRAKEFORD *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. 2d Cir. Certiorari denied.

No. 05–10312. WRIGHT *v.* GRACE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 05–10333. JORGENSEN *v.* SONY MUSIC ENTERTAINMENT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 157 Fed. Appx. 427.

No. 05–10390. Smith *v.* Department of the Treasury. C. A. Fed. Cir. Certiorari denied. Reported below: 126 Fed. Appx. 489.

No. 05–10406. Olofinjana *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 05–10419. Harbison *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 148 Fed. Appx. 187.

No. 05–10422. Johnson *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 421.

No. 05–10430. Adair *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 436 F. 3d 520.

No. 05–10433. Brock *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 433 F. 3d 931.

No. 05–10434. Abed *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 363.

No. 05–10437. Williams *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 167 Fed. Appx. 25.

No. 05–10443. Candalosa-Estrada *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 558.

No. 05–10444. Dukes *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 432 F. 3d 910.

No. 05–10446. Johnson *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–10450. Peralte, aka Black *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 866.

No. 05–10454. Moss *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 05–10455. Benson *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 05–10461. Davis, aka Calvin, aka Robinson *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–10464. Silva *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 879.

No. 05–10467. Rodriguez-Mancinas *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 774.

No. 05–10468. Nava-Juarez, aka Juarez, aka Bundeca-Hernandez *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 05–10471. Wilson *v.* United States; Mejia *v.* United States; Cano *v.* United States; and Rodriguez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 315 (first judgment); 166 Fed. Appx. 754 (third judgment); 169 Fed. Appx. 326 (fourth judgment) and 344 (second judgment).

No. 05–10473. Green *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 05–10474. Green *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 436 F. 3d 449.

No. 05–10475. Morris *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 05–10478. Andrews *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–10481. Cooks *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 168 Fed. Appx. 93.

No. 05–10483. Salazar-Palacios *v.* United States (Reported below: 164 Fed. Appx. 489); Santana-Alvarado *v.* United States (164 Fed. Appx. 503); Rodriguez-Cardenas *v.* United States (166 Fed. Appx. 767); Rivera-Garcia *v.* United States (167 Fed. Appx. 989); Hernandez-Franco, aka Hernandez *v.* United States (167 Fed. Appx. 986); Alvarez-Ontiveros *v.* United States (168 Fed. Appx. 992); Del Cid-Mendez *v.* United States (168 Fed. Appx. 580); Mendoza-Contreras *v.* United States (168 Fed. Appx. 572); Cisneros-Jimenez *v.* United States (168 Fed. Appx. 598); Arellano-Ramirez *v.* United States (169 Fed. Appx. 364); De La Garza-Rojas *v.* United States (169 Fed. Appx. 393);

Toledo-Vides *v.* United States (169 Fed. Appx. 412); Gutierrez-Mendez *v.* United States (169 Fed. Appx. 864); Alvarado-Palma *v.* United States (169 Fed. Appx. 856); Arviso-Mata *v.* United States (442 F. 3d 382); Sanchez-Navarro *v.* United States (169 Fed. Appx. 899); Lopez-Sanchez *v.* United States (169 Fed. Appx. 910); Mora-Granados *v.* United States (169 Fed. Appx. 908); Cruz *v.* United States (170 Fed. Appx. 347); Alvarado, aka Fuentes-Garcia *v.* United States (170 Fed. Appx. 880); Navarrete-Mendoza *v.* United States (172 Fed. Appx. 35); Reyes-Celestino, aka Perez *v.* United States (443 F. 3d 451); and Vasquez-Monjaraz *v.* United States (172 Fed. Appx. 608). C. A. 5th Cir. Certiorari denied.

No. 05–10489. McDaniel *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 05–10491. Lachney *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 334.

No. 05–10492. Atencio et ux. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 435 F. 3d 1222.

No. 05–10493. Brown *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 437 F. 3d 450.

No. 05–10499. Uribe Rodriguez *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 658.

No. 05–10500. Warin *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 390.

No. 05–10502. Benito-Nunez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 140 Fed. Appx. 583.

No. 05–10508. Quansah *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 171 Fed. Appx. 51.

No. 05–10511. Rivera *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 05–10512. Spiers *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 05–10513. SYPHERS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 426 F. 3d 461.

No. 05–10515. EDWARDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 132 Fed. Appx. 535.

No. 05–10519. MARES-HERNANDEZ *v.* UNITED STATES; GONZALES-LEON *v.* UNITED STATES; and GARCIA-MUNOZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 561 (first judgment); 171 Fed. Appx. 43 (second judgment); 174 Fed. Appx. 406 (third judgment).

No. 05–10522. MERTENS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 955.

No. 05–10523. SANDERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 861.

No. 05–10524. COFFEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 434 F. 3d 887.

No. 05–10526. DEWALT, AKA CARTER, AKA DEWALT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 Fed. Appx. 279.

No. 05–10529. BONNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–10536. GARZA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 435 F. 3d 73.

No. 05–10537. HARTSHORN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 325.

No. 05–10539. MOORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 174 Fed. Appx. 540.

No. 05–10541. PLOUFFE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 436 F. 3d 1062.

No. 05–10546. LLERA-PLAZA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 160 Fed. Appx. 11.

No. 05–10547. LOPEZ-MARTINEZ *v.* UNITED STATES (Reported below: 166 Fed. Appx. 123); HERNANDEZ-MARTINEZ *v.* UNITED STATES (165 Fed. Appx. 372); MENDOZA-BLANCO, AKA RODRIGUEZ-CARABEL *v.* UNITED STATES (440 F. 3d 264);

MARTINEZ-COVARRUBIAS *v.* UNITED STATES; MALDONADO-CRUZ *v.* UNITED STATES (166 Fed. Appx. 154); ZUNIGA-VIDALES *v.* UNITED STATES (166 Fed. Appx. 772); RODRIGUEZ-ALVARRAN *v.* UNITED STATES (166 Fed. Appx. 773); TEJADA-CALDERON *v.* UNITED STATES (168 Fed. Appx. 574); NAVARETTE-JACINTO *v.* UNITED STATES (169 Fed. Appx. 419); and JACINTO-LARA *v.* UNITED STATES (170 Fed. Appx. 335). C. A. 5th Cir. Certiorari denied.

No. 05–10560. OATES *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied.

No. 05–10566. ALSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 57.

No. 05–10568. BUSTILLO *v.* HOOD, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 168 Fed. Appx. 255.

No. 05–10569. BURTS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–1191. TRAVELERS CASUALTY & SURETY CO. *v.* ACANDS, INC. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 435 F. 3d 252.

No. 05–1193. NEW YORK *v.* GOLDSTEIN. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 6 N. Y. 3d 119, 843 N. E. 2d 727.

No. 05–1201. ORNOSKI, ACTING WARDEN *v.* EARP. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 431 F. 3d 1158.

No. 05–1210. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* ABDUL-SALAAM. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this motion and this petition.

No. 05–1281. DAVIS, PRESIDENT, EARTH PROTECTOR LICENSING CORP., ET AL. *v.* WALT DISNEY CO. ET AL. C. A. 8th Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 430 F. 3d 901.

No. 05–1289. EXXONMOBIL PENSION PLAN ET AL. *v.* FILES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 428 F. 3d 478.

No. 05–9826. DANDAR *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 05–9837. COLES *v.* FOLINO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 162 Fed. Appx. 100.

No. 05–9869. HENDERSON *v.* MINNESOTA. C. A. 8th Cir. Certiorari before judgment denied.

No. 05–10203. FUGAH *v.* TENNIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

*Rehearing Denied*

No. 05–8121. HURLEY *v.* FLORIDA ET AL., 546 U. S. 1186;
No. 05–8419. MASSE *v.* KNOWLES, WARDEN, ET AL., 546 U. S. 1196;
No. 05–8442. ROSS *v.* TEXAS, *ante,* p. 1007;
No. 05–8480. CLAIBORNE *v.* HOLLAND ET AL., *ante,* p. 1008;
No. 05–8486. IN RE TORRES, 546 U. S. 1167;
No. 05–8828. LODHI *v.* NEW YORK, *ante,* p. 1044;
No. 05–8849. IN RE KING, *ante,* p. 1039;
No. 05–9024. KING *v.* UNITED STATES, *ante,* p. 1009;
No. 05–9170. LILLY *v.* SCHWARTZ ET AL., *ante,* p. 1046;
No. 05–9340. MEGGISON, AKA EDWARDS *v.* UNITED STATES, *ante,* p. 1046;
No. 05–9382. TAYLOR *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, *ante,* p. 1080;
No. 05–9450. RIES *v.* BEZY, WARDEN, *ante,* p. 1050; and
No. 05–9553. SAPP *v.* UNITED STATES, *ante,* p. 1061. Petitions for rehearing denied.

No. 05–7752. VIGGIANO *v.* NEW JERSEY ET AL., 546 U. S. 1209. Petition for rehearing denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

MAY 24, 2006

*Miscellaneous Orders*

No. 05A1078 (05–11108). AGUILAR *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of execution.

No. 05–11128 (05A1080). IN RE AGUILAR. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

MAY 30, 2006

*Certiorari Dismissed*

No. 05–9996. HADLEY *v.* FISS, CHIEF JUDGE, CIRCUIT COURT OF ILLINOIS, ST. CLAIR COUNTY, ET AL. Sup. Ct. Ill. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders*

No. 05A792. TEMPLE *v.* UNITED STATES. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. 05–998. UNITED STATES *v.* RESENDIZ-PONCE. C. A. 9th Cir. [Certiorari granted, *ante,* p. 1069.] Motion of respondent for appointment of counsel granted. Atmore Baggot, Esq., of Apache Junction, Ariz., is appointed to serve as counsel for respondent in this case.

No. 05–9237. SCHARDT *v.* PAYNE, SUPERINTENDENT, MCNEIL ISLAND CORRECTIONS CENTER. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 20, 2006, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 05–10750. In re Montgomery. Petition for writ of mandamus denied.

No. 05–1224. In re Vey;
No. 05–9959. In re DeLuca;
No. 05–9990. In re Foose;
No. 05–10039. In re Collier; and
No. 05–10050. In re Bowell. Petitions for writs of mandamus and/or prohibition denied.

*Certiorari Granted*

No. 05–1256. Philip Morris USA *v.* Williams, Personal Representative of the Estate of Williams, Deceased. Sup. Ct. Ore. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 340 Ore. 35, 127 P. 3d 1165.

*Certiorari Denied*

No. 05–884. Weiner *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 152 Fed. Appx. 38.

No. 05–916. Richardson *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 421 F. 3d 17.

No. 05–929. United Seniors Assn., Inc. *v.* Social Security Administration. C. A. 4th Cir. Certiorari denied. Reported below: 423 F. 3d 397.

No. 05–935. Robertson, Individually and in Her Official Capacity as Personal Representative of the Estate of Rice *v.* Hecksel et al. C. A. 11th Cir. Certiorari denied. Reported below: 420 F. 3d 1254.

No. 05–944. Disabled American Veterans *v.* Nicholson, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 419 F. 3d 1317.

No. 05–971. Roy *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 871 A. 2d 498.

No. 05–1030. Roe, Individually and on Behalf of All Others Similarly Situated *v.* Donahue, Commissioner, Indiana Department of Correction. Ct. App. Ind. Certiorari denied. Reported below: 829 N. E. 2d 99.

No. 05–1061. BLACKETTER, SUPERINTENDENT, EASTERN OREGON CORRECTIONAL INSTITUTION, ET AL. *v.* TARABOCHIA. C. A. 9th Cir. Certiorari denied. Reported below: 140 Fed. Appx. 753.

No. 05–1084. JERSEY DENTAL LABORATORIES, FKA HOWARD HESS DENTAL LABORATORIES, INC., ET AL. *v.* DENTSPLY INTERNATIONAL, INC. C. A. 3d Cir. Certiorari denied. Reported below: 424 F. 3d 363.

No. 05–1087. SOUTHWEST INVESTMENT CO., INC., ON BEHALF OF ITSELF AND ON BEHALF OF FIRST LOUISIANA FEDERAL SAVINGS BANK *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 158 Fed. Appx. 283.

No. 05–1098. BAHAR ET AL. *v.* MICHIGAN BELL TELEPHONE CO., DBA SBC MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 05–1121. JOELSON *v.* CADWELL. C. A. 10th Cir. Certiorari denied. Reported below: 427 F. 3d 700.

No. 05–1244. YBARRA *v.* BOEING NORTH AMERICAN, INC. C. A. 9th Cir. Certiorari denied. Reported below: 424 F. 3d 1018.

No. 05–1246. VINTILLA *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 05–1247. PIPER JAFFRAY & CO., FKA U. S. BANCORP PIPER JAFFRAY INC., ET AL. *v.* PAFFHAUSEN. Sup. Ct. Mont. Certiorari denied. Reported below: 330 Mont. 401, 126 P. 3d 507.

No. 05–1260. SCALISE ET AL. *v.* BOY SCOUTS OF AMERICA ET AL. Ct. App. Mich. Certiorari denied. Reported below: 265 Mich. App. 1, 692 N. W. 2d 858.

No. 05–1270. CARRANZA ET AL. *v.* MARICOPA-STANFIELD IRRIGATION & DRAINAGE DISTRICT ET AL. Sup. Ct. Ariz. Certiorari denied. Reported below: 211 Ariz. 485, 123 P. 3d 1122.

No. 05–1287. MELA ET VIR *v.* SOUND PACIFIC RESOURCES INC. Ct. App. Wash. Certiorari denied.

No. 05–1302. LA LIGUE CONTRE LE RACISME ET L'ANTISEMITISME ET AL. *v.* YAHOO! INC. C. A. 9th Cir. Certiorari denied. Reported below: 433 F. 3d 1199.

No. 05–1314. RICCIARDELLI *v.* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS ET AL. Ct. App. D. C. Certiorari denied. Reported below: 887 A. 2d 1027.

No. 05–1354. ESPINOSA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 05–1362. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–1369. G. I. APPAREL, INC. *v.* LITSKY. C. A. 11th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 107.

No. 05–8556. SILVA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 430 F. 3d 1096.

No. 05–8997. CABALLERO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 420 F. 3d 819.

No. 05–9278. MODY *v.* MODY. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 05–9905. FREEMAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 356 Ill. App. 3d 1128, 889 N. E. 2d 808.

No. 05–9906. HANCOCK *v.* LANGLEY, CORRECTIONAL ADMINISTRATOR I, ALBEMARLE CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 145 Fed. Appx. 427.

No. 05–9908. FULLER *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 172 S. W. 3d 533.

No. 05–9909. GREEN *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 05–9914. GUDINO *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–9917. FUENTES *v.* BOARD OF EDUCATION OF CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 05–9921. SANDERS *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 05–9922. Stevenson *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 05–9925. Luther *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 108 Ohio St. 3d 1475, 842 N. E. 2d 1054.

No. 05–9928. Norris *v.* Wilson, Warden. Ct. App. Ohio, Richland County. Certiorari denied.

No. 05–9929. Abbott *v.* Hall, Superintendent, Two Rivers Correctional Institution. C. A. 9th Cir. Certiorari denied.

No. 05–9933. Harris *v.* Kirkland, Warden. C. A. 9th Cir. Certiorari denied.

No. 05–9940. Glenn *v.* Saba. Super. Ct. N. J., App. Div. Certiorari denied.

No. 05–9945. Pempton *v.* Bobby, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–9946. Hersick *v.* Mississippi. Sup. Ct. Miss. Certiorari denied.

No. 05–9954. Tokman *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 917 So. 2d 1119.

No. 05–9958. Cole *v.* Connecticut General Life Insurance Co. et al. C. A. 2d Cir. Certiorari denied. Reported below: 144 Fed. Appx. 919.

No. 05–9961. Hart *v.* Fitzpatrick. C. A. 9th Cir. Certiorari denied. Reported below: 143 Fed. Appx. 832.

No. 05–9965. Gomez *v.* Texas. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 05–9967. Golden *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied.

No. 05–9974. Smith *v.* White et al. C. A. 6th Cir. Certiorari denied.

No. 05–9976. Shabazz, aka Dean *v.* Mills, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–9987. HUFTILE *v.* MICCIO-FONSECA. C. A. 9th Cir. Certiorari denied. Reported below: 410 F. 3d 1136.

No. 05–9993. HAVIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 354 Ill. App. 3d 1160, 883 N. E. 2d 1149.

No. 05–9995. GAFFNEY *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 917 So. 2d 193.

No. 05–9997. GOMEZ *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 145 Fed. Appx. 448.

No. 05–9998. HARVEY *v.* HUFF ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 594.

No. 05–10000. HUBEL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 19 App. Div. 3d 1184, 797 N. Y. S. 2d 17.

No. 05–10002. GONZALEZ *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 05–10004. KEENAN *v.* MICHIGAN. Cir. Ct. Muskegon County, Mich. Certiorari denied.

No. 05–10009. ABDURRAHMAN *v.* ENGSTROM. C. A. D. C. Cir. Certiorari denied. Reported below: 168 Fed. Appx. 445.

No. 05–10013. JOHNSON *v.* SANTA CLARA COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 683.

No. 05–10019. PATTON *v.* SIRMONS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 425 F. 3d 788.

No. 05–10021. MURRAY *v.* MICHIGAN. Cir. Ct. Genesee County, Mich. Certiorari denied.

No. 05–10024. ROCHETTE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 05–10025. ROBERTS *v.* NORTH CAROLINA BAPTIST HOSPITAL EMPLOYEE RELATIONS. C. A. 4th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 90.

No. 05–10027. Mitchell *v.* Oklahoma et al. C. A. 10th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 81.

No. 05–10030. Lyons *v.* Dinwiddie, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 145 Fed. Appx. 630.

No. 05–10031. Mars *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 05–10033. Harrington *v.* District of Columbia Department of Employment Services et al. Ct. App. D. C. Certiorari denied. Reported below: 885 A. 2d 774.

No. 05–10036. Williams *v.* Florida. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 909 So. 2d 599.

No. 05–10040. Johnson *v.* Harmon, Warden. C. A. 8th Cir. Certiorari denied.

No. 05–10043. Bray *v.* Kentucky. Sup. Ct. Ky. Certiorari denied. Reported below: 177 S. W. 3d 741.

No. 05–10047. Bounds *v.* Arizona Department of Corrections et al. C. A. 9th Cir. Certiorari denied.

No. 05–10048. Blackburn *v.* Hoechst Marion Roussel, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 507.

No. 05–10064. Asimi *v.* Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 05–10068. Parent *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied.

No. 05–10126. Reeves *v.* St. Mary's County Commissioners et al. C. A. 4th Cir. Certiorari denied. Reported below: 127 Fed. Appx. 682.

No. 05–10131. Moore *v.* Egan et al. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 05–10152. Ramirez *v.* New York City Health & Hospitals Corp., dba Gouverneur Hospital. C. A. 2d Cir. Certiorari denied. Reported below: 167 Fed. Appx. 232.

No. 05–10157. Ayers *v.* Johnson et al. C. A. 5th Cir. Certiorari denied. Reported below: 130 Fed. Appx. 666.

No. 05–10226. Morris *v.* Giurbino, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 769.

No. 05–10253. Bunkley *v.* Michigan. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 05–10267. Turner *v.* Donnelly et al. C. A. 3d Cir. Certiorari denied. Reported below: 156 Fed. Appx. 481.

No. 05–10337. Ackerman *v.* Assurant, Inc., fka Fortis, Inc., et al. C. A. 6th Cir. Certiorari denied.

No. 05–10341. Dubon *v.* Robinson, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 511.

No. 05–10348. Dabney *v.* Giurbino, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 799.

No. 05–10366. Gomez *v.* Berge, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 434 F. 3d 940.

No. 05–10367. Holly *v.* Scott, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 434 F. 3d 287.

No. 05–10441. Cartwright *v.* Washington. Ct. App. Wash. Certiorari denied. Reported below: 126 Wash. App. 1032.

No. 05–10532. Sanchez *v.* Potter, Postmaster General. C. A. 9th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 957.

No. 05–10549. Cox *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–10550. Daugherty *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 3d 445.

No. 05–10551. Elizalde-Sanchez *v.* United States (Reported below: 169 Fed. Appx. 269); Montes-Castillo *v.* United States (164 Fed. Appx. 472); Cisneros-Colchado *v.* United States (169 Fed. Appx. 289); Don Juan-Serrano *v.* United States (169 Fed. Appx. 357); Arce-Gonzalez, aka Pulido-DeLeon *v.* United States (168 Fed. Appx. 640); Lopez-Ches *v.* United States (169 Fed. Appx. 189); Gonzalez-Guerra *v.*

United States (169 Fed. Appx. 261); Torres-Gonzalez *v.* United States (169 Fed. Appx. 190); Arreaga-Lopez, aka Arriola, aka Lopez *v.* United States (169 Fed. Appx. 226); and Velasquez, aka Pecellin *v.* United States (169 Fed. Appx. 301). C. A. 5th Cir. Certiorari denied.

No. 05–10552. Edwards *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 954.

No. 05–10554. Robison *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 560.

No. 05–10555. Reyes-Armendariz *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 688.

No. 05–10556. Smith *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 429 F. 3d 1179.

No. 05–10562. Mayberry *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 265.

No. 05–10563. Kellum *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–10564. Starkes *v.* Evans, Acting Warden. C. A. 9th Cir. Certiorari denied. Reported below: 173 Fed. Appx. 569.

No. 05–10576. Hill, aka Bailey *v.* United States et al. C. A. D. C. Cir. Certiorari denied.

No. 05–10578. Humphrey *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 05–10586. Westover *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 435 F. 3d 1273.

No. 05–10591. Park *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 584.

No. 05–10594. Hurtado-Olmedo *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 870.

No. 05–10595. Jimenez-Velasco *v.* United States; Ramos *v.* United States; Bolding *v.* United States; and Ponce *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 336 (second judgment); 166 Fed. Appx. 130 (first judgment); 169 Fed. Appx. 906 (fourth judgment); 172 Fed. Appx. 609 (third judgment).

No. 05–10596. Martinez-Figueroa *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 435 F. 3d 868.

No. 05–10597. Martinez *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 722.

No. 05–10603. Shakur *v.* Wiley, Warden. C. A. 11th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 137.

No. 05–10605. Arevalo-Lozano *v.* United States (Reported below: 165 Fed. Appx. 357); Sanchez Hernandez *v.* United States (166 Fed. Appx. 774); Gonzalez-Mendoza *v.* United States (169 Fed. Appx. 366); Mejia-Medina *v.* United States (167 Fed. Appx. 993); Romero-Flores *v.* United States (168 Fed. Appx. 599); Elizondo-Gutierrez *v.* United States (166 Fed. Appx. 114); Lugo-Valois *v.* United States (169 Fed. Appx. 905); Hernandez-Urbina *v.* United States (170 Fed. Appx. 339); Enriquez *v.* United States (168 Fed. Appx. 602); Gomez-Romero *v.* United States (168 Fed. Appx. 603); Bonilla-Fragoso *v.* United States (166 Fed. Appx. 764); Carrasco-Castro *v.* United States (166 Fed. Appx. 145); Loera-Centeno *v.* United States (168 Fed. Appx. 551); Rocha, aka Hernandez *v.* United States (169 Fed. Appx. 394); Villegas-Cruz, aka Sosa-Ramirez *v.* United States (169 Fed. Appx. 882); Mondragon-Gusman *v.* United States (168 Fed. Appx. 582); Castillo-Rodriguez *v.* United States (166 Fed. Appx. 132); Cantu-Covarrubias *v.* United States (164 Fed. Appx. 533); and Urbina-Rodriguez *v.* United States (165 Fed. Appx. 302). C. A. 5th Cir. Certiorari denied.

No. 05–10607. Vasser *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 374.

No. 05–10608. Varela-Medina *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 484.

No. 05–10611. Wash *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 05–10614. McClelland *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 223.

No. 05–10618. Jones *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 05–10619. Robertson *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 05–10620. Delana *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 167 Fed. Appx. 17.

No. 05–10621. Duenas-Aleman *v.* United States (Reported below: 165 Fed. Appx. 374); Encarnacion-Maldonado, aka Encarnacion-Estrada *v.* United States (168 Fed. Appx. 592); Felix-Salas *v.* United States (169 Fed. Appx. 848); Galan-De La Torre, aka Gomez-Torres *v.* United States (167 Fed. Appx. 990); Galvan-Mariques *v.* United States (169 Fed. Appx. 885); Garcia-Contreras *v.* United States (170 Fed. Appx. 312); Gonzalez-Martinez *v.* United States (168 Fed. Appx. 569); Hernandez-Lozano *v.* United States (169 Fed. Appx. 371); Jimenez-Sanchez *v.* United States (165 Fed. Appx. 358); Lara-Viegas *v.* United States (169 Fed. Appx. 838); Morales-Agustine *v.* United States (170 Fed. Appx. 340); Puente-Solis *v.* United States (166 Fed. Appx. 760); Rodriguez-Pecina *v.* United States (165 Fed. Appx. 325); and Mendoza Sanchez *v.* United States (168 Fed. Appx. 585). C. A. 5th Cir. Certiorari denied.

No. 05–10623. Aguirre-Jaimes *v.* United States (Reported below: 169 Fed. Appx. 360); Garcia-Herrera *v.* United States (169 Fed. Appx. 213); Mendez-Gonzalez *v.* United States (169 Fed. Appx. 192); Boche, aka Paz-Lopez, aka Pereles *v.* United States (169 Fed. Appx. 343); Torres-Sandoval *v.* United States (169 Fed. Appx. 295); Estrada-Acosta *v.* United States (168 Fed. Appx. 677); Olvera-Valdovinos *v.* United States (168 Fed. Appx. 624); Soto-Soria *v.* United States (164 Fed. Appx. 531); Martinez-Garcia *v.* United States (168 Fed. Appx. 589); Martinez-Escalante *v.* United States (164 Fed. Appx. 536); Vargas-Ramirez *v.* United States (164 Fed. Appx. 535); Gomez *v.* United States (165 Fed. Appx. 353); and Gonzalez-Ribera *v.* United States (167 Fed. Appx. 981). C. A. 5th Cir. Certiorari denied.

No. 05–10625. Washington *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 881 A. 2d 575.

No. 05–10627. VASQUEZ-RAMOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 348.

No. 05–10628. WATSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 165 Fed. Appx. 105.

No. 05–10631. MCGREW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 165 Fed. Appx. 308.

No. 05–10632. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 177 Fed. Appx. 388.

No. 05–10633. HOSKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 602.

No. 05–10637. FUNCHES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 974.

No. 05–10638. HALL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 407.

No. 05–10639. GOMEZ-ASTORGA, AKA GAITAN-DOMINGUEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 759.

No. 05–10640. SANCHEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 05–10641. HERNANDEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 436 F. 3d 851.

No. 05–10643. MORTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–10649. HERNANDEZ-CARRANZA *v.* UNITED STATES (Reported below: 164 Fed. Appx. 480); SALGADO-RANGEL, AKA RANGEL-SALGADO *v.* UNITED STATES (165 Fed. Appx. 355); ONTIVEROS-MAYORGA *v.* UNITED STATES (168 Fed. Appx. 5); ANAYA-MARTINEZ *v.* UNITED STATES (166 Fed. Appx. 109); CARMONA-CALDERON *v.* UNITED STATES (166 Fed. Appx. 149); ANARIBA-RAMIREZ, AKA ZAVALA-GUZMAN *v.* UNITED STATES; APARICIO-MARTINEZ *v.* UNITED STATES (164 Fed. Appx. 537); REYES-BAUTISTA *v.* UNITED STATES (167 Fed. Appx. 996); NARANJO-MARTINEZ *v.* UNITED STATES (168 Fed. Appx. 571); ANGON-ZAMUDIO *v.* UNITED STATES (168 Fed. Appx. 591); GONZALEZ-PARDO *v.* UNITED STATES (169 Fed. Appx. 246);

Medina-Zavala, aka Paecido, aka Quinones *v.* United States (168 Fed. Appx. 605); Escobedo-Escamilla *v.* United States (169 Fed. Appx. 365); Gonzalez-Lopez *v.* United States (169 Fed. Appx. 844); Sobrevilla-Silvestre *v.* United States (169 Fed. Appx. 417); Araguz-Briones *v.* United States (170 Fed. Appx. 332); Ramos *v.* United States (170 Fed. Appx. 329); and Garcia *v.* United States (169 Fed. Appx. 907). C. A. 5th Cir. Certiorari denied.

No. 05–10653. Flores *v.* McFadden, Warden. C. A. 11th Cir. Certiorari denied. Reported below: 152 Fed. Appx. 913.

No. 05–10656. Wilson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 360.

No. 05–10657. Williams *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 498.

No. 05–10664. Cox *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 05–10665. Pomranky *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 165 Fed. Appx. 259.

No. 05–10667. Loredo-Torres *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 523.

No. 05–10668. Maddox *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 05–10670. Castillo-Penaloza *v.* United States (Reported below: 111 Fed. Appx. 322); Castro-Guzman *v.* United States (169 Fed. Appx. 248); Lopez-Garcia *v.* United States (163 Fed. Appx. 306); Garcia-Nava *v.* United States (168 Fed. Appx. 617); Betancourt-Cruz *v.* United States (169 Fed. Appx. 249); Garza-Garza *v.* United States (169 Fed. Appx. 253); Hernandez-Hernandez *v.* United States (169 Fed. Appx. 251); Garcia-Mejia *v.* United States (169 Fed. Appx. 238); Sanchez-Valdivia *v.* United States (168 Fed. Appx. 629); Salas-Lopez *v.* United States (168 Fed. Appx. 632); Ruiz-Rosas *v.* United States (169 Fed. Appx. 270); Aguilar-Martinez, aka Acuna-Dominguez *v.* United States (169 Fed. Appx. 220); Paredes-Garcia, aka Plarales *v.* United States (169 Fed. Appx. 231); Estrada-Zamora *v.* United States (169 Fed. Appx. 217); De Leon-Garcia *v.* United States (169 Fed.

Appx. 863); GONSALEZ-VERA *v.* UNITED STATES (170 Fed. Appx. 331); and VERGARA-GONZALEZ *v.* UNITED STATES (168 Fed. Appx. 643). C. A. 5th Cir. Certiorari denied.

No. 05–10672. COLLINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 514.

No. 05–10673. SMOOT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 172 Fed. Appx. 496.

No. 05–10676. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 418.

No. 05–10678. MEANS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–10679. HARRIS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 887 A. 2d 1027.

No. 05–10684. TOTTEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–10686. STEWART *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 881 A. 2d 1100.

No. 05–10688. MIRANDA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 435 F. 3d 767.

No. 05–10689. MELGAR, AKA MELGAR BLANCO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 772.

No. 05–10693. TURNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 431 F. 3d 332.

No. 05–10699. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 05–10701. MCKOY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 431 F. 3d 1085.

No. 05–10705. PERRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 05–10709. LENDOS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–10710. CLARK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 148 Fed. Appx. 190.

No. 05–907. LOCKHEED MARTIN CORP. ET AL. *v.* MORGANTI ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 412 F. 3d 407.

No. 05–1070. TYUMEN OIL CO. ET AL. *v.* NOREX PETROLEUM LTD. C. A. 2d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 416 F. 3d 146.

No. 05–9971. RUDOLPH *v.* FOLINO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 05–9986. HARVEY *v.* PLAINS TOWNSHIP POLICE DEPARTMENT ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 421 F. 3d 185.

No. 05–10056. JACKSON *v.* GORDON ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 145 Fed. Appx. 774.

No. 05–10065. BONHAM *v.* PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 05–10087. GRIGSBY *v.* KANE ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 157 Fed. Appx. 539.

No. 05–10345. CLAY *v.* BENNING ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 05–10378. GALLOWAY *v.* GRACE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

*Rehearing Denied*

No. 05–7499. CRUTCHER *v.* NEVADA, *ante,* p. 1041;

No. 05–8604. CORDOVA *v.* SOARES, WARDEN, ET AL., 546 U. S. 1201;

No. 05–8915. GILBERT *v.* BAY AREA RAPID TRANSIT DISTRICT ET AL., *ante,* p. 1057;

No. 05–8950. HURST *v.* WILKINS, *ante,* p. 1057;

No. 05–9007. GOSS *v.* DEPARTMENT OF THE AIR FORCE, *ante,* p. 1027;

No. 05–9071. JOHNSON *v.* TERRY, WARDEN, *ante,* p. 1059;

No. 05–9149. SIMS *v.* INDIANA, *ante,* p. 1059;

No. 05–9189. MICHALSKI *v.* NEW YORK, *ante,* p. 1077;

No. 05–9252. SABBIA *v.* LOMBARDI, *ante,* p. 1078;

No. 05–9691. NORRIS *v.* WILLS ET VIR, *ante,* p. 1102; and

No. 05–9703. IN RE BLACKWELL, *ante,* p. 1054. Petitions for rehearing denied.

JUNE 1, 2006

*Miscellaneous Orders*

No. 05A1101. BOLTZ *v.* SIRMONS, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied.

No. 05A1114. BOLTZ *v.* JONES, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied.

JUNE 5, 2006

*Certiorari Dismissed*

No. 05–10755. MENDEZ *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals,* 506 U. S. 1 (1992) *(per curiam).* JUSTICE STEVENS dissents. See *id.,* at 4, and cases cited therein. Reported below: 167 Fed. Appx. 966.

*Miscellaneous Orders*

No. 05M83. MOORE *v.* COLORADO; and

No. 05M86. CREW *v.* UNITED STATES POSTAL SERVICE ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 05M84. FRUDAKIS *v.* SUFFOLK COUNTY DEPARTMENT OF PUBLIC WORKS, DESIGN AND CONSTRUCTION. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 05M85. BLANCO-LOYA *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. D–2420. IN RE DISBARMENT OF SIMURO. Disbarment entered. [For earlier order herein, see 546 U. S. 1164.]

No. D–2421. IN RE DISBARMENT OF ROSTOKER. Disbarment entered. [For earlier order herein, see 546 U. S. 1164.]

No. D–2422. IN RE DISBARMENT OF TENENBAUM. Disbarment entered. [For earlier order herein, see 546 U. S. 1165.]

No. D–2423. IN RE DISBARMENT OF ISRAEL. Disbarment entered. [For earlier order herein, see 546 U. S. 1165.]

No. D–2424. IN RE DISBARMENT OF ROBERTS. Disbarment entered. [For earlier order herein, see 546 U. S. 1165.]

No. D–2426. IN RE DISBARMENT OF ZAMECK. Disbarment entered. [For earlier order herein, see 546 U. S. 1165.]

No. 05–9324. IN RE KORNAFEL. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1068] denied.

No. 05–10918. IN RE GUINN. Petition for writ of habeas corpus denied.

*Certiorari Granted*

No. 05–908. PARENTS INVOLVED IN COMMUNITY SCHOOLS *v.* SEATTLE SCHOOL DISTRICT NO. 1 ET AL. C. A. 9th Cir. Certiorari granted, and case to be argued in tandem with No. 05–915, *Meredith, Custodial Parent and Next Friend of McDonald* v.

*Jefferson County Board of Education et al.*, immediately *infra*. Reported below: 426 F. 3d 1162.

No. 05–915. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF McDONALD *v.* JEFFERSON COUNTY BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari granted, and case to be argued in tandem with No. 05–908, *Parents Involved in Community Schools* v. *Seattle School District No. 1 et al.*, immediately *supra*. Reported below: 416 F. 3d 513.

No. 05–9222. BURTON *v.* WADDINGTON, SUPERINTENDENT, STAFFORD CREEK CORRECTIONS CENTER. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 142 Fed. Appx. 297.

*Certiorari Denied*

No. 05–469. SCHAD *v.* JONES. C. A. 7th Cir. Certiorari denied. Reported below: 415 F. 3d 671.

No. 05–471. CHAVEZ *v.* BROWNSVILLE INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 135 Fed. Appx. 664.

No. 05–905. SENECA NATION OF INDIANS ET AL. *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 382 F. 3d 245 and 383 F. 3d 45.

No. 05–956. CAWLEY, ADMINISTRATRIX OF THE ESTATE OF ABRAHAM *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. Reported below: 408 F. 3d 26.

No. 05–1089. LAWRENCE ET AL. *v.* BLACKWELL, SECRETARY OF STATE OF OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 430 F. 3d 368.

No. 05–1107. TODD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 424 F. 3d 525.

No. 05–1109. ALLEY ET AL. *v.* QUEBECOR WORLD KINGSPORT, INC., DBA QUEBECOR WORLD HAWKINS, INC. Ct. App. Tenn. Certiorari denied. Reported below: 182 S. W. 3d 300.

No. 05–1248. TECHNOLOGY LICENSING CORP. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALI-

FORNIA ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 423 F. 3d 1286.

No. 05–1249. AFFRUNTI *v.* LONG ISLAND UNIVERSITY. C. A. 2d Cir. Certiorari denied. Reported below: 136 Fed. Appx. 402.

No. 05–1254. HAAGENSEN *v.* REED ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 881 A. 2d 894.

No. 05–1263. GIBSON GUITAR CORP. *v.* PAUL REED SMITH GUITARS, LP. C. A. 6th Cir. Certiorari denied. Reported below: 423 F. 3d 539.

No. 05–1264. KANE ET AL. *v.* BOARD OF APPEALS OF PRINCE GEORGE'S COUNTY, SITTING AS THE BOARD OF ADMINISTRATIVE APPEALS. Ct. App. Md. Certiorari denied. Reported below: 390 Md. 145, 887 A. 2d 1060.

No. 05–1266. MORRIS *v.* UNUM LIFE INSURANCE COMPANY OF AMERICA. C. A. 1st Cir. Certiorari denied. Reported below: 430 F. 3d 500.

No. 05–1268. U. S. STEEL MINING CO., LLC, ET AL. *v.* HELTON, WEST VIRGINIA STATE TAX COMMISSIONER. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 219 W. Va. 1, 631 S. E. 2d 559.

No. 05–1273. COWAN *v.* TOHONO O'ODHAM NATION, BY AND THROUGH CHAIRWOMAN JUAN-SAUNDERS. Ct. App. Ariz. Certiorari denied.

No. 05–1274. HOWARD ET AL. *v.* CITY OF MARION, INDIANA, ET AL. Ct. App. Ind. Certiorari denied. Reported below: 832 N. E. 2d 528.

No. 05–1278. MANRIQUEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 37 Cal. 4th 547, 123 P. 3d 614.

No. 05–1291. MALAK *v.* GONZALES, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 419 F. 3d 533.

No. 05–1297. PHARMACEUTICAL CARE MANAGEMENT ASSN. *v.* ROWE, ATTORNEY GENERAL OF MAINE. C. A. 1st Cir. Certiorari denied. Reported below: 429 F. 3d 294.

No. 05–1299. BLAKE *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 389 Md. 124, 883 A. 2d 914.

No. 05–1324. GOMEZ *v.* UNITED STATES; and
No. 05–10509. GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 436 F. 3d 560.

No. 05–1358. TOKYO KIKAI SEISAKUSHO, LTD., ET AL. *v.* GOSS INTERNATIONAL CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 434 F. 3d 1081.

No. 05–1400. ZVI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 05–8866. CRUZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 587.

No. 05–9154. BARBER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 147 Fed. Appx. 941.

No. 05–9580. HONEYCUTT *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 426 F. 3d 957.

No. 05–9581. HARDY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 841 A. 2d 8.

No. 05–10020. O'BRIEN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 725.

No. 05–10070. ROWE *v.* REGISTER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 172 Fed. Appx. 660.

No. 05–10074. THOMAS *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 696.

No. 05–10078. YOUNG *v.* CULLIVER, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 05–10085. LAWRENCE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 880 A. 2d 9.

No. 05–10098. MOSES *v.* SIRMONS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 728.

No. 05–10099. HANSON *v.* MAHONEY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 433 F. 3d 1107.

No. 05–10102. Garcia *v.* Woodford, Acting Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 736.

No. 05–10106. Wilcox *v.* Morgan, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–10108. Baker *v.* Baskerville, Warden, et al. Sup. Ct. Va. Certiorari denied.

No. 05–10123. Evans *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 05–10138. Druitt *v.* College of William & Mary et al. C. A. 4th Cir. Certiorari denied. Reported below: 142 Fed. Appx. 179.

No. 05–10139. Anthony *v.* United States District Court for the Eastern District of Michigan. C. A. 6th Cir. Certiorari denied.

No. 05–10143. Malicoat *v.* Sirmons, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 426 F. 3d 1241.

No. 05–10144. Marquard *v.* McDonough, Interim Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 429 F. 3d 1278.

No. 05–10146. Leeth *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 945 So. 2d 1101.

No. 05–10148. Williams *v.* Alabama Board of Pardons and Paroles. Ct. Crim. App. Ala. Certiorari denied. Reported below: 935 So. 2d 478.

No. 05–10149. Rhea *v.* Texas. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 181 S. W. 3d 478.

No. 05–10153. Mills *v.* Carter, Regional Director/Region II, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 05–10155. Adams *v.* Jones, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 140 Fed. Appx. 617.

No. 05–10158. Lee *v.* Lamarque, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 130 Fed. Appx. 913.

No. 05–10161. Lancaster *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 05–10164. Raimondo *v.* Village of Armada, Michigan, et al. C. A. 6th Cir. Certiorari denied.

No. 05–10170. Grant *v.* Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 344.

No. 05–10172. Hamilton *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 353 Ill. App. 3d 1090, 881 N. E. 2d 973.

No. 05–10173. Vargas *v.* McDonough, Interim Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 05–10175. Turner *v.* McDonough, Interim Secretary, Florida Department of Corrections. Sup. Ct. Fla. Certiorari denied. Reported below: 924 So. 2d 811.

No. 05–10186. Perez *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 919 So. 2d 347.

No. 05–10187. Jackson *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 107 Ohio St. 3d 300, 839 N. E. 2d 362.

No. 05–10191. Santiago *v.* McDonough, Interim Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 05–10202. Fleming *v.* Louisiana. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 903 So. 2d 22.

No. 05–10213. Cooley *v.* Alabama Department of Mental Health. C. A. 11th Cir. Certiorari denied.

No. 05–10219. Vohra *v.* Orange County, California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 165 Fed. Appx. 542.

No. 05–10240. CALDWELL *v.* DOUGLAS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 986.

No. 05–10243. CALDWELL *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 994.

No. 05–10258. GUZIKOWSKI *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 05–10266. PATTEN *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 05–10296. OGUREK *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 356 Ill. App. 3d 429, 826 N. E. 2d 605.

No. 05–10300. LOVEDAY *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 05–10304. STRICKLAND *v.* PITCHER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 511.

No. 05–10307. BANDA *v.* NEW JERSEY SPECIAL TREATMENT UNIT ANNEX ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 164 Fed. Appx. 286.

No. 05–10309. OLIVER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 280 Kan. 681, 124 P. 3d 493.

No. 05–10365. VILLESCAS *v.* HERNANDEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 612.

No. 05–10368. HOUFF, AKA BAXTER *v.* OREGON. Ct. App. Ore. Certiorari denied.

No. 05–10372. HUDE *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 05–10411. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 05–10425. NICARRY *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 919 So. 2d 460.

No. 05–10520. JONES *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 876 A. 2d 465.

No. 05–10615. Jose *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 05–10651. Michelin *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 926 So. 2d 1283.

No. 05–10681. Wright *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 880 A. 2d 1066.

No. 05–10695. Toledo *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–10708. Shelby *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 174 Fed. Appx. 203.

No. 05–10712. Bloom *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 165 Fed. Appx. 565.

No. 05–10713. Burnette *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 423 F. 3d 22.

No. 05–10714. Barragan-Sanchez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 165 Fed. Appx. 758.

No. 05–10715. Alcala *v.* United States; Ramos-Mendiola *v.* United States; Quintero *v.* United States; and Guzman *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 165 Fed. Appx. 333 (first judgment); 168 Fed. Appx. 636 (third judgment) and 657 (fourth judgment); 169 Fed. Appx. 233 (second judgment).

No. 05–10718. Ardilla-Tepetate *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–10721. Birks *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 141 Fed. Appx. 506.

No. 05–10722. Ajaj *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 05–10724. Ahern *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 05–10727. West *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 752.

No. 05–10732. PRICE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 438 F. 3d 1005.

No. 05–10734. KELLY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 864.

No. 05–10735. LEVERING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 431 F. 3d 289.

No. 05–10737. CORNELIO-PENA, AKA PUENTE-CUEVAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 435 F. 3d 1279.

No. 05–10739. CARO PAYAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 05–10741. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 178 Fed. Appx. 590.

No. 05–10744. SILER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 116.

No. 05–10751. EATMON *v.* B. D. MORGAN, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 145 Fed. Appx. 839.

No. 05–10756. DANSER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–10760. HOLGUIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 436 F. 3d 111.

No. 05–10761. GRISSOM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–10762. MEEKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 297.

No. 05–10766. MARISCAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 425.

No. 05–10767. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 215.

No. 05–10769. HAYNES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 940.

No. 05–10770. ARRIETTA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 436 F. 3d 1246.

No. 05–10771. UDONKANG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 162.

No. 05–10772. ALVAREZ-PEREZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 797.

No. 05–10778. HASTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 168 Fed. Appx. 548.

No. 05–10779. ISLAND, AKA TOMAS, AKA THOMAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 05–10780. GONZALEZ, AKA RUIZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 441 F. 3d 596.

No. 05–10781. MCMILLION *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 175 Fed. Appx. 588.

No. 05–10783. THOMAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 165 Fed. Appx. 138.

No. 05–10785. INGUANZO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 110.

No. 05–10790. MATTHEWS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 440 F. 3d 818.

No. 05–10791. BARRETT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 755.

No. 05–10795. GARCIA-LEAL *v.* UNITED STATES (Reported below: 166 Fed. Appx. 138); CORADO *v.* UNITED STATES (168 Fed. Appx. 615); ALCAZAR-OLIVAREZ, AKA GONZALEZ *v.* UNITED STATES (169 Fed. Appx. 187); ZAMBRANO-DUENEZ *v.* UNITED STATES (169 Fed. Appx. 234); GARCIA-ARIOLA *v.* UNITED STATES (168 Fed. Appx. 619); HERNANDEZ-GONZALEZ *v.* UNITED STATES (169 Fed. Appx. 207); RAMIREZ-TRUJILLO *v.* UNITED STATES (169 Fed. Appx. 272); GARCIA-HERNANDEZ *v.* UNITED STATES (169 Fed. Appx. 230); SALAS-JIMENEZ *v.* UNITED STATES (168 Fed. Appx. 625); RODRIGUEZ-RUIZ *v.* UNITED STATES (169 Fed. Appx. 212); ACUNA-SALAZAR *v.* UNITED STATES (169 Fed. Appx. 281); FELIX-TERRAZAS *v.* UNITED STATES (169 Fed. Appx. 244); HERNANDEZ-AGUIRRE *v.* UNITED STATES (169 Fed. Appx. 193); RIOS-RIVERA *v.* UNITED STATES (169 Fed. Appx. 237); MARTINEZ-GASCA *v.* UNITED STATES (168 Fed. Appx. 626); PEREZ-BARRIENTOS *v.* UNITED STATES (169 Fed. Appx. 283);

KINTANA-CAMACHO *v.* UNITED STATES (169 Fed. Appx. 254); MONTES-FLORES, AKA BLANCO-CARRIYO *v.* UNITED STATES (169 Fed. Appx. 227); AGUILAR-CRISTALES *v.* UNITED STATES (169 Fed. Appx. 263); CHIRINOS-TORRES *v.* UNITED STATES (169 Fed. Appx. 191); GUERECA-TRISTAN *v.* UNITED STATES (169 Fed. Appx. 237); ROMERO-MONTIEL, AKA ROMERO *v.* UNITED STATES (169 Fed. Appx. 273); RODRIGUEZ-CAMPOS *v.* UNITED STATES (169 Fed. Appx. 232); VALLEJO-MORENO *v.* UNITED STATES (169 Fed. Appx. 265); MOLINA-MARTINEZ *v.* UNITED STATES (169 Fed. Appx. 192); GUEVARA-BETANCOURT *v.* UNITED STATES (169 Fed. Appx. 205); GAYTON-SILVA, AKA REYNOSO-CARILLO *v.* UNITED STATES (169 Fed. Appx. 315); CASTANEDA-SALGADO, AKA GUERRA *v.* UNITED STATES (168 Fed. Appx. 666); MORENO-MORA *v.* UNITED STATES (169 Fed. Appx. 392); ARGUETA-RAMIREZ *v.* UNITED STATES (169 Fed. Appx. 851); VARGAS-GUILLEN *v.* UNITED STATES (169 Fed. Appx. 414); GONZALEZ-RUIZ *v.* UNITED STATES (169 Fed. Appx. 920); and DIAZ-PEREZ, AKA CABRABA *v.* UNITED STATES (177 Fed. Appx. 392). C. A. 5th Cir. Certiorari denied.

No. 05–10805. STONE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–10806. ROBINSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 05–10810. BURKETT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 05–10814. BLACK BEAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 05–10816. BURSE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 150 Fed. Appx. 829.

No. 04–1025. KIRBY *v.* CITY OF ELIZABETH CITY, NORTH CAROLINA, ET AL. C. A. 4th Cir. Motion of Professional Fire Fighters and Paramedics of North Carolina et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 388 F. 3d 440.

No. 05–969. DROGIN ET AL. *v.* WEN HO LEE ET AL.; and
No. 05–1114. THOMAS *v.* WEN HO LEE. C. A. D. C. Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of these petitions. Reported below: 413 F. 3d 53.

No. 05–1119. Cingular Wireless, LLC *v.* Mendoza et al. Ct. App. Cal., 1st App. Dist. Motions of Pacific Legal Foundation, American Bankers Association et al., Chamber of Commerce of the United States of America, and Amazon.Com, Inc., et al., for leave to file briefs as *amici curiae* granted. Certiorari denied.

No. 05–10388. Chin *v.* Carey, Warden. C. A. 9th Cir. Certiorari denied. Justice Breyer took no part in the consideration or decision of this petition. Reported below: 160 Fed. Appx. 633.

No. 05–10768. Smith *v.* United States. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 104 Fed. Appx. 266.

*Rehearing Denied*

No. 05–858. Alston *v.* City of Philadelphia, Zoning Board of Adjustment, et al., *ante,* p. 1019;

No. 05–861. Bowersock *v.* City of Lima, Ohio, et al., *ante,* p. 1019;

No. 05–994. Lawrence *v.* Westinghouse Savannah River Co. LLC, *ante,* p. 1070;

No. 05–6375. Beras *v.* United States, 546 U. S. 966;

No. 05–8693. Jordan *v.* B. F. Fields Moving & Storage, Inc., *ante,* p. 1026;

No. 05–8751. Robinson *v.* Padula, Warden, et al., *ante,* p. 1043;

No. 05–9138. Mertens *v.* City of Seattle, Washington, et al., *ante,* p. 1076;

No. 05–9139. Taylor *v.* Barnhart, Commissioner of Social Security, *ante,* p. 1028;

No. 05–9163. Phillips *v.* Missouri, *ante,* p. 1059;

No. 05–9390. Doby *v.* McDonough, Interim Secretary, Florida Department of Corrections, *ante,* p. 1080;

No. 05–9488. Spencer *v.* Kemna, Superintendent, Crossroads Correctional Center, *ante,* p. 1081;

No. 05–9583. Graves *v.* Equal Employment Opportunity Commission et al., *ante,* p. 1082;

No. 05–9809. Suggs *v.* United States, *ante,* p. 1089;

No. 05–9902. In re Osamor, *ante,* p. 1068; and

No. 05–10150. Seals *v.* United States, *ante,* p. 1121. Petitions for rehearing denied.

No. 05–1031. PALLOTTA *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, *ante,* p. 1092;

No. 05–8401. RHINES *v.* UNITED STATES, 546 U. S. 1210; and

No. 05–8793. JOSEPH *v.* WEST MANHEIM POLICE DEPARTMENT ET AL., *ante,* p. 1052. Petitions for rehearing denied. JUSTICE ALITO took no part in the consideration or decision of these petitions.

No. 05–6350. ZADEH *v.* CALIFORNIA, 546 U. S. 1019. Motion for leave to file petition for rehearing denied.

## JUNE 8, 2006

### *Miscellaneous Order*

No. 05A1147. WALTON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. Application for preliminary injunction, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

### *Certiorari Denied*

No. 05–11199 (05A1100). WALTON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of execution. Reported below: 440 F. 3d 160.

## JUNE 12, 2006

### *Certiorari Granted—Vacated and Remanded*

No. 05–710. FRIEMANN *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Zedner* v. *United States, ante,* p. 489. Reported below: 136 Fed. Appx. 396.

No. 05–988. LINGLE, GOVERNOR OF HAWAII *v.* ARAKAKI ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *DaimlerChrysler Corp.* v. *Cuno, ante,* p. 332. Reported below: 423 F. 3d 954. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 05–7009. Smith *v.* United States. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Zedner* v. *United States, ante,* p. 489. Reported below: 415 F. 3d 682.

No. 05–9182. Bazan *v.* United States. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Booker,* 543 U. S. 220 (2005). Reported below: 114 Fed. Appx. 157.

*Certiorari Dismissed*

No. 05–10624. Al-Hakim *v.* United States District Court for the Northern District of Florida. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders*

No. 05A738. Schulz *v.* Washington County Board of Supervisors et al. C. A. 2d Cir. Application for stay, addressed to Justice Scalia and referred to the Court, denied.

No. 05M87. Gossage *v.* Office of Personnel Management. Motion of petitioner for leave to proceed as a veteran granted.

No. 05M88. Devbrow *v.* Cotton, Superintendent, Pendleton Correctional Facility. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 05–409. Kircher et al. *v.* Putnam Funds Trust et al. C. A. 7th Cir. [Certiorari granted, 546 U. S. 1085.] Motion of respondents for leave to file supplemental brief after argument granted. Motion of petitioners for leave to file supplemental brief after argument granted.

No. 05–493. Ornaski, Warden *v.* Belmontes. C. A. 9th Cir. [Certiorari granted, *ante,* p. 1110.] Motion of respondent for appointment of counsel granted. Eric S. Multhaup, Esq., of Mill Valley, Cal., is appointed to serve as counsel for respondent in this case.

No. 05–1159. Hatch, Attorney General of Minnesota *v.* Cellco Partnership, dba Verizon Wireless, et al. C. A.

8th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 05–1526 (05A1090). In re Grand Jury Proceedings. C. A. 11th Cir. Application for stay, addressed to Justice Breyer and referred to the Court, denied. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 05–9212. LaFreniere *v.* Trustees of California State University. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1054] denied.

No. 05–10231. DeLuca *v.* Katchmeric. Sup. Ct. Va.; and
No. 05–10655. Heath *v.* Perry. C. A. 8th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 3, 2006, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 05–10224. In re Cothron. Petition for writ of mandamus denied.

*Certiorari Granted*

No. 05–996. Marrama *v.* Citizens Bank of Massachusetts et al. C. A. 1st Cir. Certiorari granted. Reported below: 430 F. 3d 474.

No. 05–9264. James *v.* United States. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 2 presented by the petition. Reported below: 430 F. 3d 1150.

*Certiorari Denied*

No. 04–1276. Dotson *v.* Griesa, Judge, United States District Court for the Southern District of New York, et al. C. A. 2d Cir. Certiorari denied. Reported below: 398 F. 3d 156.

No. 05–1019. Artus, Superintendent, Clinton Correctional Facility *v.* Gersten. C. A. 2d Cir. Certiorari denied. Reported below: 426 F. 3d 588.

No. 05–1032. OTAH *v.* GONZALES, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied.

No. 05–1037. XEROX CORP. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 423 F. 3d 1356.

No. 05–1062. COREAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 419 F. 3d 151.

No. 05–1073. MARTIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 426 F. 3d 68.

No. 05–1082. BUTTRICK *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 432 F. 3d 373.

No. 05–1125. OSMAN, INDEPENDENT ADMINISTRATRIX OF THE ESTATE OF LAUGHLIN, DECEASED *v.* FORD MOTOR CO. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 359 Ill. App. 3d 367, 833 N. E. 2d 1011.

No. 05–1136. E. I. DU PONT DE NEMOURS & CO. *v.* LIVING DESIGNS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 431 F. 3d 353.

No. 05–1138. ALABAMA ET AL. *v.* UNITED STATES ARMY CORPS OF ENGINEERS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 424 F. 3d 1117.

No. 05–1141. MATTAPONI INDIAN TRIBE ET AL. *v.* VIRGINIA ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 270 Va. 423, 621 S. E. 2d 78.

No. 05–1142. SNYDER, FORMER DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. *v.* THORNTON. C. A. 7th Cir. Certiorari denied. Reported below: 428 F. 3d 690.

No. 05–1280. DESERT LAND, LLC *v.* DEL MAR MORTGAGE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 586.

No. 05–1283. SADOSKI *v.* MOSLEY, JUDGE, DISTRICT COURT OF NEVADA, CLARK COUNTY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 435 F. 3d 1076.

No. 05–1290. KOVALCHICK *v.* R/S FINANCIAL CORP. Super. Ct. Pa. Certiorari denied.

No. 05–1292. Barr *v.* Camelot Forest Conservation Assn., Inc., et al. C. A. 3d Cir. Certiorari denied. Reported below: 153 Fed. Appx. 860.

No. 05–1295. Mitchell *v.* Los Angeles County, California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 433 F. 3d 1138.

No. 05–1296. Schindler *v.* Whiteman et al. C. A. 2d Cir. Certiorari denied. Reported below: 431 F. 3d 57.

No. 05–1300. Anduze *v.* Florida Atlantic University. C. A. 11th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 875.

No. 05–1338. Harter *v.* Commissioner for Patents. C. A. Fed. Cir. Certiorari denied. Reported below: 164 Fed. Appx. 981.

No. 05–1371. Anthony *v.* Virginia State Bar. Sup. Ct. Va. Certiorari denied. Reported below: 270 Va. 601, 621 S. E. 2d 121.

No. 05–1377. Smallridge *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 904 So. 2d 601.

No. 05–1383. Abernethy *v.* Snow, Secretary of the Treasury. C. A. 11th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 896.

No. 05–1395. Taylor et al. *v.* Securities and Exchange Commission. C. A. 9th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 659.

No. 05–1408. Rodriguez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 853.

No. 05–1417. Jones *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 05–9351. Sampson *v.* United States; and
No. 05–9423. Franklin *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 867 A. 2d 988.

No. 05–9579. Fowler *v.* Indiana. Ct. App. Ind. Certiorari denied. Reported below: 809 N. E. 2d 960.

No. 05–9782. PETTY *v.* STINE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 424 F. 3d 509.

No. 05–10200. FOX *v.* HURLEY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 333.

No. 05–10201. GONZALEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 05–10207. FITCH *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 05–10222. BLANTON *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–10232. ELKINS *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 918 So. 2d 828.

No. 05–10235. JAMES *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 05–10238. ROSS *v.* SPITZER, ATTORNEY GENERAL OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 161 Fed. Appx. 175.

No. 05–10245. SMITH *v.* ORANGE COUNTY, CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied. Reported below: 132 Cal. App. 4th 1434, 34 Cal. Rptr. 3d 383.

No. 05–10252. BERGSTROM *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 05–10257. LANG *v.* BRISCOE ET AL. C. A. 6th Cir. Certiorari denied.

No. 05–10260. MCGHEE *v.* PALMER. C. A. 6th Cir. Certiorari denied.

No. 05–10262. LANE *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 920 So. 2d 3.

No. 05–10265. FLEMING *v.* CARUSO, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 6th Cir. Certiorari denied.

No. 05–10268. Wilcox *v.* Gribbins. C. A. 6th Cir. Certiorari denied.

No. 05–10269. Woodard *v.* Mississippi. Sup. Ct. Miss. Certiorari denied.

No. 05–10270. Garner *v.* Kentucky. Ct. App. Ky. Certiorari denied.

No. 05–10274. Hall *v.* Romanowski, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–10282. Bowman *v.* South Carolina. Sup. Ct. S. C. Certiorari denied. Reported below: 366 S. C. 485, 623 S. E. 2d 378.

No. 05–10284. Bennett *v.* Light. C. A. 6th Cir. Certiorari denied.

No. 05–10288. Byrd *v.* Cornell Corrections, Inc., et al. C. A. 10th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 759.

No. 05–10292. Dent *v.* Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 05–10293. Coleman *v.* Washington. Sup. Ct. Wash. Certiorari denied.

No. 05–10294. Encalade *v.* Wakefield et al. C. A. 5th Cir. Certiorari denied.

No. 05–10302. Michaelesco *v.* EMC Mortgage et al. C. A. 2d Cir. Certiorari denied. Reported below: 154 Fed. Appx. 230.

No. 05–10303. Chisum *v.* Kelley et al. C. A. 5th Cir. Certiorari denied.

No. 05–10306. Aubuchont *v.* Cattell, Warden. C. A. 1st Cir. Certiorari denied.

No. 05–10313. Nelson *v.* Kemna, Superintendent, Crossroads Correctional Center. C. A. 8th Cir. Certiorari denied.

No. 05–10319. HAMM *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 876 A. 2d 463.

No. 05–10328. COLONEL *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 922 So. 2d 197.

No. 05–10340. SIMPSON *v.* WALKER, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 05–10352. NOORLUN *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 705 N. W. 2d 819.

No. 05–10386. PHU VAN HUYNH *v.* CASTRO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 725.

No. 05–10426. PARIS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 05–10432. BLAKE *v.* POTTER, POSTMASTER GENERAL, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 131 Fed. Appx. 777.

No. 05–10463. SCARBERRY *v.* IOWA. C. A. 8th Cir. Certiorari denied. Reported below: 430 F. 3d 956.

No. 05–10488. SAFRIT *v.* PICKELSIMER, SUPERINTENDENT, PIEDMONT CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied.

No. 05–10490. NUNEZ *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 05–10504. ABIMBOLA *v.* GONZALES, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Certiorari denied.

No. 05–10544. KALSKI *v.* LOS ANGELES COUNTY, CALIFORNIA, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 05–10557. LOWERY *v.* ARIZONA. Super. Ct. Ariz., County of Yavapai. Certiorari denied.

No. 05–10585. ZARAGOZA *v.* EVANS, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 145 Fed. Appx. 572.

No. 05–10692. WATERFIELD *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 05–10696. Mattox *v.* Kansas. Sup. Ct. Kan. Certiorari denied. Reported below: 280 Kan. 473, 124 P. 3d 6.

No. 05–10698. Lagrassa *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 05–10704. Lewis *v.* Grams, Warden. C. A. 7th Cir. Certiorari denied.

No. 05–10717. Brock *v.* Kansas. Sup. Ct. Kan. Certiorari denied. Reported below: 280 Kan. xxiii, 127 P. 3d 341.

No. 05–10720. Branch *v.* Pruett, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 148 Fed. Appx. 162.

No. 05–10725. Clark *v.* Kansas. Sup. Ct. Kan. Certiorari denied. Reported below: 280 Kan. xxiii, 127 P. 3d 341.

No. 05–10733. Pierre *v.* Connecticut. Sup. Ct. Conn. Certiorari denied. Reported below: 277 Conn. 42, 890 A. 2d 474.

No. 05–10745. Walkup *v.* Haines, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 776.

No. 05–10797. Lewis *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–10801. Dill, aka Tucker *v.* United States et al. C. A. 5th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 244.

No. 05–10817. Davis *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 05–10820. White *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 623.

No. 05–10821. Resnick *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 295.

No. 05–10827. Treto-Banuelos *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 165 Fed. Appx. 668.

No. 05–10833. White *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 863 A. 2d 839.

No. 05–10834. Sierra-Gonzalez *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 52.

No. 05–10835. Wilson *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 437 F. 3d 616.

No. 05–10836. Boomer *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 165 Fed. Appx. 266.

No. 05–10837. Abrego-Villarreal *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 837.

No. 05–10839. Bass *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 444.

No. 05–10840. Bennett *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 05–10841. Black *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–10842. Black *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 149 Fed. Appx. 547.

No. 05–10843. Acklin *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 414.

No. 05–10844. Washington *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 05–10845. West *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 150.

No. 05–10853. Paz-Barona *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 172 Fed. Appx. 278.

No. 05–10854. Jensen *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 290.

No. 05–10859. Santiago-Ocasio *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 05–10860. De La Garza *v.* United States; Pardinas-Flores, aka Pardinas *v.* United States; Hernandez-Gutierrez *v.* United States; Sierra-Gaitan, aka Doe *v.* United States; and Barrera *v.* United States. C. A. 9th Cir.

Certiorari denied. Reported below: 166 Fed. Appx. 981 (second judgment); 167 Fed. Appx. 654 (third judgment); 168 Fed. Appx. 225 (first judgment); 177 Fed. Appx. 622 (fourth judgment) and 682 (fifth judgment).

No. 05–10861. Curry *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 165 Fed. Appx. 277.

No. 05–10862. Daniels *v.* United States (two judgments). C. A. 4th Cir. Certiorari denied.

No. 05–10863. Leach *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 171 Fed. Appx. 765.

No. 05–10864. Walter *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 434 F. 3d 30.

No. 05–10868. Durham *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 172 Fed. Appx. 261.

No. 05–10870. Martinez Enriquez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 134.

No. 05–10871. Erazo *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–10876. Jackson *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 05–10881. Whitman *v.* Bartow, Director, Wisconsin Resource Center. C. A. 7th Cir. Certiorari denied. Reported below: 434 F. 3d 968.

No. 05–10887. Hooper *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 397.

No. 05–10888. Gonzalez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 124.

No. 05–10908. Johnson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 3d 793.

No. 05–10909. McDougald *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 450.

No. 05–10914. Tatum *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 165 Fed. Appx. 367.

No. 05–10915. VARGAS-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 266.

No. 05–10920. FRANCE, AKA FRANCIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 50.

No. 05–10921. PAGE *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Forsyth County, N. C. Certiorari denied.

No. 05–1024. EVANS, ACTING WARDEN *v.* TREVINO. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 150 Fed. Appx. 741.

No. 05–1128. ARAKAKI ET AL. *v.* LINGLE, GOVERNOR OF HAWAII, ET AL. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 423 F. 3d 954.

No. 05–1167. TEXAS *v.* PENRY. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 178 S. W. 3d 782.

No. 05–1204. SARKES TARZIAN, INC. *v.* U. S. TRUST COMPANY OF FLORIDA SAVINGS BANK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TARZIAN. C. A. 7th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 168 Fed. Appx. 108.

No. 05–1372. SPIEGEL *v.* LENG ET AL. App. Ct. Ill., 1st Dist. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 357 Ill. App. 3d 1089, 895 N. E. 2d 697.

No. 05–9916. KLIESH *v.* BUCKS COUNTY DOMESTIC RELATIONS. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 05–10706. RANGEL-REYES *v.* UNITED STATES (Reported below: 168 Fed. Appx. 616); REYNA-MATA *v.* UNITED STATES (169 Fed. Appx. 198); ESTRADA SANCHEZ, AKA ESTRADA-SANCHEZ *v.* UNITED STATES (168 Fed. Appx. 611); PERALTA-BARAJAS *v.* UNITED STATES (169 Fed. Appx. 188); MORIN-GARCIA, AKA MORALES-GARCIA *v.* UNITED STATES (169 Fed. Appx. 284);

Reyes-Najera *v.* United States (169 Fed. Appx. 279); Osorto-Fortin, aka Fortin, aka Osorto Martinez, aka Ortiz Solis, aka Osorto, aka Gonzalez, aka Osorto Fortin *v.* United States (169 Fed. Appx. 359); Espina-Moscoso *v.* United States (169 Fed. Appx. 356); Avalos-Cortez, aka Cortez-Avalos *v.* United States (169 Fed. Appx. 355); Alvizo-Corpuz *v.* United States (169 Fed. Appx. 296); Rodriguez-Maradiaga *v.* United States (169 Fed. Appx. 186); Macias-Leon *v.* United States (169 Fed. Appx. 354); Ortiz-Cervantes *v.* United States (169 Fed. Appx. 305); Garcia-Gonzalez *v.* United States (169 Fed. Appx. 325); Arvizu-Garcia *v.* United States (171 Fed. Appx. 460); Silva-Espinoza *v.* United States (176 Fed. Appx. 495); Huerta-Martinez *v.* United States (176 Fed. Appx. 522); Gaytan-Perez *v.* United States (176 Fed. Appx. 512); and Garay-Orellana *v.* United States (169 Fed. Appx. 302). C. A. 5th Cir.;

No. 05–10743. Shuman *v.* United States (Reported below: 165 Fed. Appx. 250). C. A. 4th Cir.; and

No. 05–10815. Banegas-Hernandez *v.* United States (Reported below: 169 Fed. Appx. 255); Cano-Rodriguez *v.* United States (169 Fed. Appx. 229); Garcia-Gallegos *v.* United States (169 Fed. Appx. 267); Rodriguez-Mercado, aka Villafranco-Ponce *v.* United States (169 Fed. Appx. 202); Rodriguez-Del Campo *v.* United States (168 Fed. Appx. 676); Herrera-Martinez *v.* United States (168 Fed. Appx. 664); and Gonzalez-Macias *v.* United States (169 Fed. Appx. 287). C. A. 5th Cir. Certiorari denied.

Statement of Justice Stevens respecting the denial of the petitions for writs of certiorari.

While I continue to believe that *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998), was wrongly decided, that is not a sufficient reason for revisiting the issue. The denial of a jury trial on the narrow issues of fact concerning a defendant's prior conviction history, unlike the denial of a jury trial on other issues of fact that give rise to mandatory minimum sentences, see *Harris* v. *United States*, 536 U. S. 545 (2002), will seldom create any significant risk of prejudice to the accused. Accordingly, there is no special justification for overruling *Almendarez-Torres*. Moreover, countless judges in countless cases have relied on *Almendarez-Torres* in making sentencing determinations. The doctrine of *stare decisis* provides a sufficient basis for the denial of certiorari in these cases.

JUSTICE THOMAS, dissenting.

Under our Constitution, a person accused of a crime is entitled to a "trial, by an impartial jury of the State and district wherein the crime shall have been committed," Amdt. 6, pursuant to an indictment for that offense by a grand jury, Amdt. 5. See also Art. III, §2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury"). Determining the proper scope of these constitutional rights requires a definition of the term "crime." As I have previously written, "a 'crime' includes *every fact* that is by law a basis for imposing or increasing punishment." *Apprendi* v. *New Jersey,* 530 U. S. 466, 501 (2000) (concurring opinion) (emphasis added).

Notwithstanding the broad meaning of the term "crime," this Court has qualified the protections of the Fifth and Sixth Amendments by holding that, "*[o]ther than the fact of a prior conviction,* any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.,* at 490 (majority opinion) (emphasis added). But the exception to trial by jury for establishing "the fact of a prior conviction" finds its basis not in the Constitution, but in a precedent of this Court. See *Almendarez-Torres* v. *United States,* 523 U. S. 224 (1998). Moreover, it has long been clear that a majority of this Court now rejects that exception. See *Shepard* v. *United States,* 544 U. S. 13, 27–28 (2005) (THOMAS, J., concurring in part and concurring in judgment); see also *Almendarez-Torres, supra,* at 248–249 (SCALIA, J., joined by STEVENS, SOUTER, and GINSBURG, JJ., dissenting); *Apprendi, supra,* at 520–521 (THOMAS, J., concurring).

In our previous cases, the parties have not asked this Court to overrule *Almendarez-Torres. Apprendi, supra,* at 489–490; *Shepard, supra,* at 28 (THOMAS, J., concurring in part and concurring in judgment). Last Term, I indicated that the Court should address the ongoing validity of the *Almendarez-Torres* exception in an appropriate case. *Shepard, supra,* at 28. Petitioners, like many other criminal defendants, have done their part by specifically presenting this Court with opportunities to reconsider *Almendarez-Torres.* It is time for this Court to do its part.

The Court's duty to resolve this matter is particularly compelling, because we are the *only* court authorized to do so. See

*State Oil Co.* v. *Khan,* 522 U. S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents"). And until we do so, countless criminal defendants will be denied the full protection afforded by the Fifth and Sixth Amendments, notwithstanding the agreement of a majority of the Court that this result is unconstitutional. There is no good reason to allow such a state of affairs to persist.

Accordingly, I dissent from the Court's denial of certiorari.

No. 05–10726. SANTO *v.* PIAZZA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

*Rehearing Denied*

No. 05–877. JERONIMO-BAUTISTA *v.* UNITED STATES, *ante,* p. 1069;

No. 05–967. M2 SOFTWARE, INC. *v.* MADACY ENTERTAINMENT ET AL.; and M2 SOFTWARE, INC. *v.* M2 COMMUNICATIONS, L.L.C., ET AL., *ante,* p. 1069;

No. 05–985. TITTLE *v.* BOTTORFF-TITTLE ET AL., *ante,* p. 1070;

No. 05–1015. AMAYA *v.* PITNER ET AL., *ante,* p. 1070;

No. 05–1038. VALLADARES *v.* DIEDE ET AL., *ante,* p. 1097;

No. 05–9049. IN RE HOWARD, *ante,* p. 1068;

No. 05–9078. VELISHKA *v.* T. N. T. HOME BUILDERS ET AL., *ante,* p. 1074;

No. 05–9107. PAGEL *v.* WASHINGTON MUTUAL BANK, INC., ET AL., *ante,* p. 1075;

No. 05–9248. BEA *v.* VIRGINIA, *ante,* p. 1078;

No. 05–9299. FULLER *v.* CAMUS, DBA UNITED STATES MARSHALS SERVICE, PREMIER TRENDS, ET AL., *ante,* p. 1080;

No. 05–9310. WILSON *v.* GODDARD, ATTORNEY GENERAL OF ARIZONA, ET AL., *ante,* p. 1080;

No. 05–9388. CRUZ *v.* FLORIDA DEPARTMENT OF CORRECTIONS, *ante,* p. 1101;

No. 05–9416. WILLIAMS *v.* WASHINGTON, WARDEN, *ante,* p. 1081;

No. 05–9419. HARBISON *v.* BELL, WARDEN, *ante,* p. 1101;

No. 05–9621. IN RE DOOSE, *ante,* p. 1097; and

No. 05–9648. MILLS *v.* HELLING, WARDEN, ET AL., *ante,* p. 1117. Petitions for rehearing denied.

JUNE 14, 2006

*Dismissal Under Rule 46*

No. 05–11105. MILES *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 440 F. 3d 693.

JUNE 19, 2006

*Certiorari Granted—Vacated and Remanded.* (See also No. 05–6997, *ante,* p. 867.)

No. 05–8895. RUTHERFORD *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hill* v. *McDonough, ante,* p. 573. Reported below: 438 F. 3d 1087.

*Certiorari Dismissed*

No. 05–10314. GANT *v.* 24 HOUR FITNESS WORLD WIDE INC. ET AL. Ct. App. Tex., 2d Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 05–11108. AGUILAR *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Ct. Crim. App. Tex. Certiorari dismissed as moot.

*Miscellaneous Orders*

No. 05M89. JOINER *v.* AMERICAN RED CROSS. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. D–2425. IN RE DISBARMENT OF AYELE. Disbarment entered. [For earlier order herein, see 546 U. S. 1165.]

No. 135, Orig. TEXAS ET AL. *v.* LEAVITT, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. Motion of plaintiffs for preliminary injunction denied. Motion for leave to file bill of complaint denied.

No. 04–1324. Day *v.* McDonough, Interim Secretary, Florida Department of Corrections, *ante,* p. 198. Respondent is invited to file a response to the petition for rehearing within 30 days.

No. 05–1157. Credit Suisse First Boston Ltd. et al. *v.* Billing et al. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. The Chief Justice took no part in the consideration or decision of this order.

*Certiorari Granted*

No. 05–1240. Wallace *v.* Kato et al. C. A. 7th Cir. Certiorari granted limited to the following question: "When does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment accrue when the fruits of the search were introduced in the claimant's criminal trial and he was convicted?" Reported below: 440 F. 3d 421.

No. 05–1342. Watters, Commissioner, Michigan Office of Insurance and Financial Services *v.* Wachovia Bank, N. A., et al. C. A. 6th Cir. Certiorari granted. Justice Thomas took no part in the consideration or decision of this petition. Reported below: 431 F. 3d 556.

No. 05–1382. Gonzales, Attorney General *v.* Planned Parenthood Federation of America, Inc., et al. C. A. 9th Cir. Certiorari granted. Reported below: 435 F. 3d 1163.

*Certiorari Denied*

No. 04–1702. Franklin *v.* Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 05–331. Air Conditioning & Refrigeration Institute et al. *v.* Energy Resources Conservation & Development Commission et al. C. A. 9th Cir. Certiorari denied. Reported below: 410 F. 3d 492.

No. 05–417. Empresa Cubana del Tabaco, aka Cubatabaco *v.* General Cigar Co., Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 399 F. 3d 462.

No. 05–1042. MILLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 430 F. 3d 93.

No. 05–1099. UNAL *v.* AKINCI-UNAL. App. Ct. Mass. Certiorari denied. Reported below: 64 Mass. App. 212, 832 N. E. 2d 1.

No. 05–1165. NEW CINGULAR WIRELESS SERVICES, INC., FKA AT&T WIRELESS SERVICES, INC. *v.* BUCY. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 05–1168. TEXAS STATE BANK *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 423 F. 3d 1370.

No. 05–1169. NEW CINGULAR WIRELESS SERVICES, INC., FKA AT&T WIRELESS SERVICES, INC., ET AL. *v.* MEOLI ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 05–1170. CINGULAR WIRELESS, LLC *v.* WING. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 05–1171. SASSON *v.* SOKOLOFF, INDIVIDUALLY AND AS TRUSTEE FOR CAMELOT MEDICAL GROUP, INC., PROFIT SHARING PLAN. C. A. 9th Cir. Certiorari denied. Reported below: 424 F. 3d 864.

No. 05–1187. SAMUEL *v.* SUPERIOR MACHINE COMPANY OF SOUTH CAROLINA, INC. C. A. 4th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 486.

No. 05–1194. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE *v.* DEJA VU OF NASHVILLE, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 421 F. 3d 417.

No. 05–1206. STRAWBRIDGE ET UX. *v.* SUGAR MOUNTAIN RESORT, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 152 Fed. Appx. 286.

No. 05–1234. C. P. ET VIR *v.* J. D. Sup. Ct. Mont. Certiorari denied. Reported below: 329 Mont. 337, 124 P. 3d 1091.

No. 05–1275. HOLOCAUST SURVIVORS FOUNDATION USA, INC., ET AL. *v.* UNION BANK OF SWITZERLAND ET AL.; and

No. 05–1416. WEISSHAUS ET AL. *v.* UNION BANK OF SWITZERLAND ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 424 F. 3d 132.

No. 05–1303. Slagle *v.* Clarion County, Pennsylvania. C. A. 3d Cir. Certiorari denied. Reported below: 435 F. 3d 262.

No. 05–1316. Hoggatt *v.* Youth Court of Adams County, Mississippi. Ct. App. Miss. Certiorari denied.

No. 05–1320. Courtney *v.* Ohio. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 05–1321. Mackenzie *v.* Donovan et al. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 23 App. Div. 3d 361, 804 N. Y. S. 2d 112.

No. 05–1322. Palinski *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 05–1325. Ford *v.* County of Hawaii et al. Sup. Ct. Haw. Certiorari denied. Reported below: 108 Haw. 318, 120 P. 3d 217.

No. 05–1330. Stewart *v.* Silva. C. A. 9th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 647.

No. 05–1341. Princo Corp. et al. *v.* U. S. Philips Corp. C. A. Fed. Cir. Certiorari denied. Reported below: 424 F. 3d 1179.

No. 05–1351. Baca, Sheriff, Los Angeles County, California, et al. *v.* Moreno et al. C. A. 9th Cir. Certiorari denied. Reported below: 431 F. 3d 633.

No. 05–1364. Stearman *v.* Commissioner of Internal Revenue. C. A. 5th Cir. Certiorari denied. Reported below: 436 F. 3d 533.

No. 05–1393. Chen *v.* Northwestern University. C. A. 7th Cir. Certiorari denied. Reported below: 175 Fed. Appx. 24.

No. 05–1434. Johnson *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 437 F. 3d 665.

No. 05–1441. Hart et al. *v.* City of Little Rock, Arkansas. C. A. 8th Cir. Certiorari denied. Reported below: 432 F. 3d 801.

No. 05–1452. Willaman *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 437 F. 3d 354.

No. 05–1453. McCullough, aka Boyington *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 469.

No. 05–1460. Harris *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 107.

No. 05–5810. Bosley *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 409 F. 3d 657.

No. 05–8656. Abdul-Wasi *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 05–8880. Coakley *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 145 Fed. Appx. 410.

No. 05–9085. Bradford *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 396.

No. 05–9212. LaFreniere *v.* Trustees of California State University. C. A. 9th Cir. Certiorari denied.

No. 05–9467. Mooney *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 425 F. 3d 1093.

No. 05–9469. Burke *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 425 F. 3d 400.

No. 05–9558. Jimenez-Cid *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 697.

No. 05–9733. Brown *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 898.

No. 05–9779. Martin *v.* Alabama. Sup. Ct. Ala. Certiorari denied. Reported below: 931 So. 2d 759.

No. 05–10315. Freeman *v.* Texas. Ct. App. Tex., 11th Dist. Certiorari denied. Reported below: 168 S. W. 3d 888.

No. 05–10318. Hill *v.* Texas. Ct. App. Tex., 10th Dist. Certiorari denied.

No. 05–10321. Howard *v.* Kozak et al. C. A. 6th Cir. Certiorari denied.

No. 05–10324. Burns *v.* Washington. Ct. App. Wash. Certiorari denied. Reported below: 126 Wash. App. 1056.

No. 05–10327. Ciaprazi *v.* Artus, Superintendent, Clinton Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 151 Fed. Appx. 62.

No. 05–10339. Stout *v.* Bell, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–10343. Coleman *v.* Arizona. Ct. App. Ariz. Certiorari denied.

No. 05–10344. Kindred *v.* La Bossiere et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 05–10346. Estrada *v.* Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 292.

No. 05–10350. Johnson *v.* Washington. Ct. App. Wash. Certiorari denied. Reported below: 127 Wash. App. 1033.

No. 05–10357. Smith *v.* Salish Kootenai College et al. C. A. 9th Cir. Certiorari denied. Reported below: 434 F. 3d 1127.

No. 05–10363. Rooklidge *v.* Driver and Motor Vehicle Services Branch of the Oregon Department of Transportation (DMV) et al. Ct. App. Ore. Certiorari denied.

No. 05–10369. Harvey *v.* Crist, Attorney General of Florida. C. A. 11th Cir. Certiorari denied.

No. 05–10371. Gaitan *v.* Conagra Beef Co. et al. Ct. App. Colo. Certiorari denied.

No. 05–10373. Fauconier *v.* Waters et al. C. A. 4th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 644.

No. 05–10374. Fenlon *v.* United States District Court for the Southern District of Texas. C. A. 5th Cir. Certiorari denied.

No. 05–10375. Harrell *v.* Texas. Ct. App. Tex., 10th Dist. Certiorari denied.

No. 05–10376. Fenstermacher *v.* Gillis, Superintendent, State Correctional Institution at Coal Township, et al. C. A. 3d Cir. Certiorari denied.

No. 05–10377. ChiariGuerrero *v.* Florida. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 909 So. 2d 868.

No. 05–10380. Modica *v.* Texas. Ct. App. Tex., 9th Dist. Certiorari denied. Reported below: 151 S. W. 3d 716.

No. 05–10382. Bolden *v.* City of New York, New York, et al. C. A. 2d Cir. Certiorari denied. Reported below: 151 Fed. Appx. 88.

No. 05–10384. Hann *v.* Michigan Department of Corrections. Ct. App. Mich. Certiorari denied.

No. 05–10392. Miller et al. *v.* Bronson et ux. Ct. App. Wash. Certiorari denied.

No. 05–10395. Nghiem *v.* Agha et al. C. A. 9th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 723.

No. 05–10396. Nields *v.* Bradshaw, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–10398. Vu Huy Nguyen *v.* Kernan, Warden. C. A. 9th Cir. Certiorari denied.

No. 05–10399. Mancebo *v.* Adams, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 435 F. 3d 977.

No. 05–10405. Crittenden *v.* Morgan, Warden. C. A. 6th Cir. Certiorari denied.

No. 05–10407. Braxton *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 05–10409. Saldana Perez *v.* Texas. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 05–10417. Fadlallah *v.* Dearborn Public Schools. Ct. App. Mich. Certiorari denied.

No. 05–10423. Matthews *v.* Nevada et al. Sup. Ct. Nev. Certiorari denied. Reported below: 121 Nev. 1149, 152 P. 3d 787.

No. 05–10424. Sengsuwan *v.* Whorton, Director, Nevada Department of Corrections, et al. C. A. 9th Cir. Certiorari denied.

No. 05–10436. Borst *v.* Washington. Ct. App. Wash. Certiorari denied. Reported below: 125 Wash. App. 1029.

No. 05–10438. Khuong Van Wang *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 05–10439. Williams *v.* Runnels, Warden. C. A. 9th Cir. Certiorari denied.

No. 05–10440. Wilcox *v.* Mudd et al. C. A. 6th Cir. Certiorari denied.

No. 05–10445. Dorval *v.* Cathel, Administrator, New Jersey State Prison, et al. C. A. 3d Cir. Certiorari denied.

No. 05–10447. Kaufman *v.* Hepp, Warden. C. A. 7th Cir. Certiorari denied.

No. 05–10448. Lomas *v.* Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 05–10449. Pearson *v.* Ohio. C. A. 6th Cir. Certiorari denied.

No. 05–10451. Tems *v.* Texas. Ct. App. Tex., 6th Dist. Certiorari denied.

No. 05–10452. Glass *v.* Underwood. Ct. App. Tenn. Certiorari denied.

No. 05–10456. Battles *v.* Buss, Superintendent, Indiana State Prison. C. A. 7th Cir. Certiorari denied.

No. 05–10457. Chavez Lerma *v.* Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 05–10458. Williford *v.* Alabama. Sup. Ct. Ala. Certiorari denied. Reported below: 931 So. 2d 10.

No. 05–10460. Cobb *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 905 So. 2d 936.

No. 05–10495. DARDEN *v.* BERKELEY COMMUNITY MEDIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 896.

No. 05–10644. JORDAN *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 174 N. C. App. 479, 621 S. E. 2d 229.

No. 05–10660. DANNER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 923 So. 2d 1162.

No. 05–10674. SLOVER ET AL. *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 05–10675. SULOLLARI *v.* GONZALES, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 842.

No. 05–10784. THIRSTON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 05–10811. ANDERSON *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 176 Fed. Appx. 242.

No. 05–10823. MARTIN *v.* CHIARA. C. A. 6th Cir. Certiorari denied.

No. 05–10855. REED *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 181 S. W. 3d 567.

No. 05–10878. HUTCHINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–10889. GOLOSOW, AKA TERAZZO *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 05–10892. GUYTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–10895. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 165 Fed. Appx. 586.

No. 05–10898. HUGHES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 144 Fed. Appx. 966.

No. 05–10901. Hackley *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 301.

No. 05–10904. Fields *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 05–10906. Guillen-Zapata *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 75.

No. 05–10912. Davis *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 375.

No. 05–10913. Clark *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 147 Fed. Appx. 387.

No. 05–10922. Demery *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 521.

No. 05–10928. Nunn *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 249.

No. 05–10930. Williams *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 431 F. 3d 296.

No. 05–10933. Sasso *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 167 Fed. Appx. 623.

No. 05–10934. Leon Guerrero *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 995.

No. 05–10935. Oakman *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 05–10939. Duboc *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 441.

No. 05–10941. James *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 172 Fed. Appx. 144.

No. 05–10942. Olivas-Aldame *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 307.

No. 05–10943. Merino-Leon *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 170 Fed. Appx. 679.

No. 05–10944. Pritchett *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 170 Fed. Appx. 252.

No. 05–10947. LUEDTKE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–10951. ROSS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 05–10952. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 453.

No. 05–10953. FLIPPEN *v.* POLK, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 05–10956. REYES-ENCINAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 167 Fed. Appx. 610.

No. 05–10957. KNOWS HIS GUN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 438 F. 3d 913.

No. 05–10961. GARDENER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 687.

No. 05–10962. GRUNEFELD, AKA GRUNFELD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–10963. GIBSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 434 F. 3d 1234.

No. 05–10965. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 172 Fed. Appx. 132.

No. 05–10969. ASHCROFT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 454.

No. 05–10971. ZAMBRANO BERRIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 172 Fed. Appx. 247.

No. 05–10972. BURGESS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 170 Fed. Appx. 275.

No. 05–10973. BADILLO-PEREZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–10976. AMISON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 170 Fed. Appx. 707.

No. 05–10979. VIOLA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–10987. Suarez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 947.

No. 05–10989. Triplett *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 753.

No. 05–10991. Wolfe *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 228.

No. 05–11001. Barrientos-Maldonado *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 168 Fed. Appx. 829.

No. 05–11003. Barker *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 437 F. 3d 787.

No. 05–11008. Santacruz-Sanchez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 982.

No. 05–11011. Scofield *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 433 F. 3d 580.

No. 05–11013. Browning *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 436 F. 3d 780.

No. 05–11016. Ovalle-Marquez *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 05–11017. Ryan-Webster *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 142 Fed. Appx. 779.

No. 05–11019. Mejia *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 171 Fed. Appx. 406.

No. 05–11021. Jones *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 05–11023. Rios *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 200.

No. 05–11024. Saldana-Lopez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 559.

No. 05–11027. Anthony *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 906.

No. 05–11031. Richardson *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–11033. Hernandez-Perez *v.* United States; Gonzalez-Silva, aka Garcia-Salaiza *v.* United States; Nunez-Munoz *v.* United States; Hernandez-Arredondo *v.* United States; Martin-Parada *v.* United States; Miranda-Sanchez *v.* United States; Reyna-Veloz, aka Paz-Rodriguez *v.* United States; and Martinez-Mendoza, aka Alvarez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 758 (first judgment); 167 Fed. Appx. 998 (fourth judgment); 168 Fed. Appx. 566 (third judgment) and 601 (sixth judgment); 169 Fed. Appx. 282 (seventh judgment), 298 (eighth judgment), 874 (second judgment), and 884 (fifth judgment).

No. 05–11035. Harrod *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 144 Fed. Appx. 331.

No. 05–11037. Terry *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 05–11038. Taylor *v.* Holinka, Warden. C. A. 8th Cir. Certiorari denied.

No. 05–11039. Hands *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–11040. Guerrero *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 757.

No. 05–11042. Pophal *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 864.

No. 05–11044. Joseph *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 168 Fed. Appx. 891.

No. 05–11046. Stapleton *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 3d 700.

No. 05–11047. Medina-Valenzuela *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 171 Fed. Appx. 32.

No. 05–11049. Jackson *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 05–11050. Aguirre-Cruz *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 171 Fed. Appx. 69.

No. 05–11051. Ayon *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 894.

No. 05–11053. Alvarado *v.* United States (Reported below: 168 Fed. Appx. 658); Baena-Aguilar *v.* United States (168 Fed. Appx. 637); Carrillo-Maravilla *v.* United States (168 Fed. Appx. 627); Cruz-Alvarado *v.* United States (168 Fed. Appx. 645); De Paz-Saucedo *v.* United States (168 Fed. Appx. 618); Pena-Amaro *v.* United States (169 Fed. Appx. 214); Anaya-Gomez, aka Nava-Vasquez, aka Hernandez *v.* United States (169 Fed. Appx. 299); Martinez-Herrera *v.* United States (168 Fed. Appx. 678); Sandoval *v.* United States (169 Fed. Appx. 353); Silva-Rodriguez *v.* United States (169 Fed. Appx. 325); and Garcia-Mendoza *v.* United States (169 Fed. Appx. 288). C. A. 5th Cir. Certiorari denied.

No. 05–11054. Morales *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 05–11055. Wright *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 393.

No. 05–11056. Velez *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 167 Fed. Appx. 349.

No. 05–11058. Ciampi *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 419 F. 3d 20.

No. 05–11060. Shipp *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 05–11061. Fairclough *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 439 F. 3d 76.

No. 05–11063. Good *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 170 Fed. Appx. 820.

No. 05–11064. Thomas *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 05–11065. Dowdell *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 158 Fed. Appx. 442.

No. 05–11066. Payne *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 437 F. 3d 540.

No. 05–11067. BUILES MEDINA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 167 Fed. Appx. 161.

No. 05–11068. JAMIESON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 427 F. 3d 394.

No. 05–11070. MALDONADO-GUTIERREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 175 Fed. Appx. 795.

No. 05–11079. PERRY *v.* DEWALT, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 591.

No. 05–489. SMITHKLINE BEECHAM CORP. ET AL. *v.* APOTEX CORP. ET AL. C. A. Fed. Cir. Motion of Washington Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 403 F. 3d 1331.

No. 05–736. TILTON, ACTING SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION *v.* RAMIREZ. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 128 Fed. Appx. 663.

No. 05–755. ORNOSKI, ACTING WARDEN *v.* REYES. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 399 F. 3d 964.

No. 05–1135. CRATER CORP. *v.* LUCENT TECHNOLOGIES, INC., ET AL. C. A. Fed. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 423 F. 3d 1260.

No. 05–1309. ALABAMA *v.* ADAMS. Sup. Ct. Ala. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 955 So. 2d 1106.

No. 05–10418. HERRSCHAFT *v.* GRACE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

*Rehearing Denied*

No. 05–8534. GLAGOLA *v.* ILLINOIS, *ante,* p. 1023;

No. 05–8650. WRIGHT *v.* RYAN, ACTING WARDEN, *ante,* p. 1025;

No. 05–9109. TAYLOR *v.* TAYLOR, WARDEN, *ante,* p. 1075;

No. 05–9258. COCKRELL *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, *ante,* p. 1079;

No. 05–9387. MINTON *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante,* p. 1101;

No. 05–9479. LEWIS *v.* GEORGIA, *ante,* p. 1116;

No. 05–9671. IN RE HIGGINS, *ante,* p. 1110; and

No. 05–10038. CORINES *v.* UNITED STATES, *ante,* p. 1105. Petitions for rehearing denied.

### JUNE 20, 2006

*Miscellaneous Order*

No. 05A1187. REESE *v.* LIVINGSTON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

*Certiorari Denied*

No. 05–11590 (05A1177). REESE *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

# AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on April 12, 2006, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1222. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Appellate Procedure and amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, 441 U. S. 973, 475 U. S. 1153, 490 U. S. 1125, 500 U. S. 1007, 507 U. S. 1059, 511 U. S. 1155, 514 U. S. 1137, 517 U. S. 1255, 523 U. S. 1147, 535 U. S. 1123, 538 U. S. 1071, and 544 U. S. 1151.

# LETTER OF TRANSMITTAL

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SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 12, 2006

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
*Chief Justice of the United States*

## SUPREME COURT OF THE UNITED STATES

APRIL 12, 2006

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein an amendment to Appellate Rule 25 and a new Rule 32.1.

[See *infra*, p. 1225.]

2. That the foregoing amendment and new rule shall take effect on December 1, 2006, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

# AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

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*Rule 25. Filing and service.*

(*a*) *Filing.*

* * * * *

(*2*) *Filing: method and timeliness.*

* * * * *

(*D*) *Electronic filing.*—A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

* * * * *

*Rule 32.1. Citing judicial dispositions.*

(*a*) *Citation permitted.*—A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

(ii) issued on or after January 1, 2007.

(*b*) *Copies required.*—If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

# AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 12, 2006, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1228. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, 511 U. S. 1169, 514 U. S. 1145, 517 U. S. 1263, 520 U. S. 1285, 526 U. S. 1169, 529 U. S. 1147, 532 U. S. 1077, 535 U. S. 1139, 538 U. S. 1075, 541 U. S. 1097, and 544 U. S. 1163.

# LETTER OF TRANSMITTAL

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Supreme Court of the United States
WASHINGTON, D. C.

April 12, 2006

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) John G. Roberts, Jr.
*Chief Justice of the United States*

# SUPREME COURT OF THE UNITED STATES

APRIL 12, 2006

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1009, 5005, and 7004.

[See *infra*, pp. 1231–1232.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2006, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

# AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

*Rule 1009. Amendments of voluntary petitions, lists, schedules and statements.*

* * * * *

(*c*) *Statement of social security number.*—If a debtor becomes aware that the statement of social security number submitted under Rule 1007(f) is incorrect, the debtor shall promptly submit an amended verified statement setting forth the correct social security number. The debtor shall give notice of the amendment to all of the entities required to be included on the list filed under Rule 1007(a)(1) or (a)(2).

(*d*) *Transmission to United States trustee.*—The clerk shall promptly transmit to the United States trustee a copy of every amendment filed or submitted under subdivision (a), (b), or (c) of this rule.

*Rule 5005. Filing and transmittal of papers.*

(*a*) *Filing.*

* * * * *

(*2*) *Filing by electronic means.*—A court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A document filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

* * * * *

(*c*) *Error in filing or transmittal.*—A paper intended to be filed with the clerk but erroneously delivered to the United States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the clerk of the bankruptcy court. A paper intended to be transmitted to the United States trustee but erroneously delivered to the clerk, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the United States trustee. In the interest of justice, the court may order that a paper erroneously delivered shall be deemed filed with the clerk or transmitted to the United States trustee as of the date of its original delivery.

*Rule 7004. Process; service of summons, complaint.*

. . . . .

(*b*) *Service by first class mail.*

. . . . .

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed writing.

. . . . .

(*g*) *Service on debtor's attorney.*—If the debtor is represented by an attorney, whenever service is made upon the debtor under this Rule, service shall also be made upon the debtor's attorney by any means authorized under Rule 5(b) F. R. Civ. P.

. . . . .

# AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 12, 2006, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post,* p. 1234. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, 500 U. S. 963, 507 U. S. 1089, 514 U. S. 1151, 517 U. S. 1279, 520 U. S. 1305, 523 U. S. 1221, 526 U. S. 1183, 529 U. S. 1155, 532 U. S. 1085, 535 U. S. 1147, 538 U. S. 1083, and 544 U. S. 1173.

# LETTER OF TRANSMITTAL

---

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 12, 2006

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the reports of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
*Chief Justice of the United States*

# SUPREME COURT OF THE UNITED STATES

APRIL 12, 2006

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein the amendments to Civil Rules 5, 9, 14, 16, 24, 26, 33, 34, 37, 45, 50, and 65.1; Form 35; and new Rule 5.1.

[See *infra*, pp. 1237–1254.]

2. That the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions be, and they hereby are, amended by including therein the amendments to Rules A, C, and E, and new Rule G.

[See *infra*, pp. 1255–1267.]

3. That the foregoing amendments to the Federal Rules of Civil Procedure and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions shall take effect on December 1, 2006, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

4. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

## AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

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*Rule 5. Service and filing of pleadings and other papers.*

*  *  *  *  *

(*e*) *Filing with the court defined.*—The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

*Rule 5.1. Constitutional challenge to a statute—notice, certification, and intervention.*

(*a*) *Notice by a party.*—A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:

(1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:

(A) a federal statute is questioned and neither the United States nor any of its agencies, officers, or employees is a party in an official capacity, or

(B) a state statute is questioned and neither the state nor any of its agencies, officers, or employees is a party in an official capacity; and

(2) serve the notice and paper on the Attorney General of the United States if a federal statute is challenged—or on the state attorney general if a state statute is challenged—either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

(*b*) *Certification by the court.*—The court must, under 28 U. S. C. § 2403, certify to the Attorney General of the United States that there is a constitutional challenge to a federal statute, or certify to the state attorney general that there is a constitutional challenge to a state statute.

(*c*) *Intervention; final decision on the merits.*—Unless the court sets a later time, the attorney general may intervene within 60 days after the notice of constitutional question is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

(*d*) *No forfeiture.*—A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

*Rule 9. Pleading special matters.*

. . . . .

(*h*) *Admiralty and maritime claims.*—A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), and 82, and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U. S. C. § 1292(a)(3).

*Rule 14. Third-party practice.*

(*a*) *When defendant may bring in third party.*

. . . . .

The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, a person who asserts a right under Supplemental Rule C(6)(a)(1) in the property arrested.

. . . . .

(*c*) *Admiralty and maritime claims.*—When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or person who asserts a right under Supplemental Rule C(6)(a)(1), as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

*Rule 16. Pretrial conferences; scheduling; management.*

. . . . .

(*b*) *Scheduling and planning.*—Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;
(2) to file motions; and
(3) to complete discovery.

The scheduling order also may include

(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(5) provisions for disclosure or discovery of electronically stored information;

(6) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production;

(7) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(8) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

* * * * *

*Rule 24. Intervention.*

* * * * *

(*c*) *Procedure.*—A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene.

*Rule 26. General provisions governing discovery; duty of disclosure.*

(*a*) *Required disclosures; methods to discover additional matter.*

(*1*) *Initial disclosures.*—Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

* * * * *

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1):

* * * * *

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to proceedings in other courts; and

(ix) an action to enforce an arbitration award.

. . . . .

(*b*) *Discovery scope and limits.*—Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

. . . . .

(*2*) *Limitations.*

(A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

. . . . .

(*5*) *Claims of privilege or protection of trial-preparation materials.*

(*A*) *Information withheld.*—When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(*B*) *Information produced.*—If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

. . . . .

(*f*) *Conference of parties; planning for discovery.*—Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) any issues relating to claims of privilege or of protection as trial-preparation material, including—if the parties agree on a procedure to assert such claims after production—whether to ask the court to include their agreement in an order;

(5) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(6) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

* * * * *

*Rule 33. Interrogatories to parties.*

* * * * *

(*d*) *Option to produce business records.*—Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

### *Rule 34. Production of documents, electronically stored information, and things and entry upon land for inspection and other purposes.*

(*a*) *Scope.*—Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained—translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(*b*) *Procedure.*—The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

(i) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(iii) a party need not produce the same electronically stored information in more than one form.

. . . . .

*Rule 37. Failure to make disclosures or cooperate in discovery; sanctions.*

. . . . .

(*f*) *Electronically stored information.*—Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

. . . . .

*Rule 45. Subpoena.*

(*a*) *Form; issuance.*

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) A subpoena must issue as follows:

. . . . .

(C) for production, inspection, copying, testing, or sampling, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

(*b*) *Service.*

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing,

trial, production, inspection, copying, testing, or sampling specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U. S. C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) *Protection of persons subject to subpoenas.*

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(*d*) *Duties in responding to subpoena.*

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(*e*) *Contempt.*—Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

*Rule 50. Judgment as a matter of law in jury trials; alternative motion for new trial; conditional rulings.*

(*a*) *Judgment as a matter of law.*

(*1*) *In general.*—If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(*2*) *Motion.*—A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(*b*) *Renewing the motion after trial; alternative motion for a new trial.*—If the court does not grant a motion for judgment as a matter of law made under subdivision (a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment or—if the motion addresses a jury issue not decided by a verdict—no later than 10 days after the jury was discharged. The movant may alternatively request a new trial or join a motion for a new trial under Rule 59.

In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

. . . . .

*Rule 65.1. Security: proceedings against sureties.*

Whenever these rules, including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

### FORM 35. REPORT OF PARTIES' PLANNING MEETING

. . . . .

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects:

______ (brief description of subjects on which discovery will be needed) ______.

Disclosure or discovery of electronically stored information should be handled as follows:

______ (brief description of parties' proposals) ______.

The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows:

______ (brief description of provisions of proposed order) ______.

All discovery commenced in time to be completed by ___ (date) ___.

[Discovery on ___ (issue for early discovery) ___ to be completed by ___ (date) ___.]

# AMENDMENTS TO THE SUPPLEMENTAL RULES FOR ADMIRALTY OR MARITIME CLAIMS AND ASSET FORFEITURE ACTIONS

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*Rule A. Scope of rules.*

(1) These Supplemental Rules apply to:

(A) the procedure in admiralty and maritime claims within the meaning of Rule 9(h) with respect to the following remedies:

(i) maritime attachment and garnishment,

(ii) actions in rem,

(iii) possessory, petitory, and partition actions, and

(iv) actions for exoneration from or limitation of liability;

(B) forfeiture actions in rem arising from a federal statute; and

(C) the procedure in statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not. Except as otherwise provided, references in these Supplemental Rules to actions in rem include such analogous statutory condemnation proceedings.

(2) The Federal Rules of Civil Procedure also apply to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules.

*Rule C. In rem actions: special provisions.*

(*1*) *When available.*—An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

* * * * *

(*2*) *Complaint.*—In an action in rem the complaint must:

(a) be verified;

(b) describe with reasonable particularity the property that is the subject of the action; and

(c) state that the property is within the district or will be within the district while the action is pending.

(*3*) *Judicial authorization and process.*

(*a*) *Arrest warrant.*

(i) The court must review the complaint and any supporting papers. If the conditions for an in rem action appear to exist, the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action.

(ii) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property that is the subject of the action. The plaintiff has the burden in any post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed.

(*b*) *Service.*

(i) If the property that is the subject of the action is a vessel or tangible property on board a vessel, the warrant and any supplemental process must be delivered to the marshal for service.

(ii) If the property that is the subject of the action is other property, tangible or intangible, the warrant and any supplemental process must be delivered to a person or organization authorized to enforce it, who may be: (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

. . . . .

(*6*) *Responsive pleading; interrogatories.*

(*a*) *Maritime arrests and other proceedings.*

(i) a person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

. . . . .

(iv) a person who asserts a right of possession or any ownership interest must serve an answer within 20 days after filing the statement of interest or right.

(*b*) *Interrogatories.*

. . . . .

*Rule E. Actions in rem and quasi in rem: general provisions.*

. . . . .

(*3*) *Process.*

(a) In admiralty and maritime proceedings process in rem or of maritime attachment and garnishment may be served only within the district.

(*b*) *Issuance and delivery.*

. . . . .

(*5*) *Release of property.*

(*a*) *Special bond.*—Whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisement, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

. . . . .

(*9*) *Disposition of property; sales.*

(*a*) *Interlocutory sales; delivery.*

. . . . .

(ii) In the circumstances described in Rule E(9)(a)(i), the court, on motion by a defendant or a person filing a statement of interest or right under Rule C(6), may order that the property, rather than being sold, be delivered to the movant upon giving security under these rules.

(*b*) *Sales, proceeds.*

. . . . .

*Rule G. Forfeiture actions in rem.*

(*1*) *Scope.*—This rule governs a forfeiture action in rem arising from a federal statute. To the extent that this rule does not address an issue, Supplemental Rules C and E and the Federal Rules of Civil Procedure also apply.

(*2*) *Complaint.*—The complaint must:

(a) be verified;

(b) state the grounds for subject-matter jurisdiction, in rem jurisdiction over the defendant property, and venue;

(c) describe the property with reasonable particularity;

(d) if the property is tangible, state its location when any seizure occurred and—if different—its location when the action is filed;

(e) identify the statute under which the forfeiture action is brought; and

(f) state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial.

(*3*) *Judicial authorization and process.*

(*a*) *Real property.*—If the defendant is real property, the government must proceed under 18 U. S. C. §985.

(*b*) *Other property; arrest warrant.*—If the defendant is not real property:

(i) the clerk must issue a warrant to arrest the property if it is in the government's possession, custody, or control;

(ii) the court—on finding probable cause—must issue a warrant to arrest the property if it is not in the government's possession, custody, or control and is not subject to a judicial restraining order; and

(iii) a warrant is not necessary if the property is subject to a judicial restraining order.

(*c*) *Execution of process.*

(i) The warrant and any supplemental process must be delivered to a person or organization authorized to execute it, who may be: (A) a marshal or any other United States officer or employee; (B) someone under contract with the United States; or (C) someone specially appointed by the court for that purpose.

(ii) The authorized person or organization must execute the warrant and any supplemental process on property in the United States as soon as practicable unless:

(A) the property is in the government's possession, custody, or control; or

(B) the court orders a different time when the complaint is under seal, the action is stayed before the warrant and supplemental process are executed, or the court finds other good cause.

(iii) The warrant and any supplemental process may be executed within the district or, when authorized by statute, outside the district.

(iv) If executing a warrant on property outside the United States is required, the warrant may be transmitted to an appropriate authority for serving process where the property is located.

(*4*) *Notice.*

(*a*) *Notice by publication.*

(*i*) *When publication is required.*—A judgment of forfeiture may be entered only if the government has published notice of the action within a reasonable time after filing the complaint or at a time the court orders. But notice need not be published if:

(A) the defendant property is worth less than $1,000 and direct notice is sent under Rule G(4)(b) to every person the government can reasonably identify as a potential claimant; or

(B) the court finds that the cost of publication exceeds the property's value and that other means of notice would satisfy due process.

(*ii*) *Content of the notice.*—Unless the court orders otherwise, the notice must:

(A) describe the property with reasonable particularity;

(B) state the times under Rule G(5) to file a claim and to answer; and

(C) name the government attorney to be served with the claim and answer.

(*iii*) *Frequency of publication.*—Published notice must appear:

(A) once a week for three consecutive weeks; or

(B) only once if, before the action was filed, notice of nonjudicial forfeiture of the same property was published on an official internet government forfeiture site for at least 30 consecutive days, or in a newspaper of general circulation for three consecutive weeks in a district where publication is authorized under Rule G(4)(a)(iv).

(*iv*) *Means of publication.*—The government should select from the following options a means of publication reasonably calculated to notify potential claimants of the action:

(A) if the property is in the United States, publication in a newspaper generally circulated in the district where the action is filed, where the property was seized, or where property that was not seized is located;

(B) if the property is outside the United States, publication in a newspaper generally circulated in a district where the action is filed, in a newspaper generally circulated in the country where the property is located, or in legal notices published and generally circulated in the country where the property is located; or

(C) instead of (A) or (B), posting a notice on an official internet government forfeiture site for at least 30 consecutive days.

(*b*) *Notice to known potential claimants.*

(*i*) *Direct notice required.*—The government must send notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant on the facts known to the government before the end of the time for filing a claim under Rule G(5)(a)(ii)(B).

(*ii*) *Content of the notice.*—The notice must state:

(A) the date when the notice is sent;

(B) a deadline for filing a claim, at least 35 days after the notice is sent;

(C) that an answer or a motion under Rule 12 must be filed no later than 20 days after filing the claim; and

(D) the name of the government attorney to be served with the claim and answer.

(*iii*) *Sending notice.*

(A) The notice must be sent by means reasonably calculated to reach the potential claimant.

(B) Notice may be sent to the potential claimant or to the attorney representing the potential claimant with respect to the seizure of the property or in a related investigation, administrative forfeiture proceeding, or criminal case.

(C) Notice sent to a potential claimant who is incarcerated must be sent to the place of incarceration.

(D) Notice to a person arrested in connection with an offense giving rise to the forfeiture who is not incarcerated when notice is sent may be sent to the address that person last gave to the agency that arrested or released the person.

(E) Notice to a person from whom the property was seized who is not incarcerated when notice is sent may be sent to the last address that person gave to the agency that seized the property.

(*iv*) *When notice is sent.*—Notice by the following means is sent on the date when it is placed in the mail, delivered to a commercial carrier, or sent by electronic mail.

(*v*) *Actual notice.*—A potential claimant who had actual notice of a forfeiture action may not oppose or seek relief from forfeiture because of the government's failure to send the required notice.

(*5*) *Responsive pleadings.*

(*a*) *Filing a claim.*

(i) A person who asserts an interest in the defendant property may contest the forfeiture by filing a claim in the court where the action is pending. The claim must:

(A) identify the specific property claimed;

(B) identify the claimant and state the claimant's interest in the property;

(C) be signed by the claimant under penalty of perjury; and

(D) be served on the government attorney designated under Rule G(4)(a)(ii)(C) or (b)(ii)(D).

(ii) Unless the court for good cause sets a different time, the claim must be filed:

(A) by the time stated in a direct notice sent under Rule G(4)(b);

(B) if notice was published but direct notice was not sent to the claimant or the claimant's attorney, no later than 30 days after final publication of newspaper notice or legal notice under Rule G(4)(a) or no later than 60 days after the first day of publication on an official internet government forfeiture site; or

(C) if notice was not published and direct notice was not sent to the claimant or the claimant's attorney:

(1) if the property was in the government's possession, custody, or control when the complaint was filed, no later than 60 days after the filing, not counting any time when the complaint was under seal or when the action was stayed before execution of a warrant issued under Rule G(3)(b); or

(2) if the property was not in the government's possession, custody, or control when the complaint was filed, no later than 60 days after the government complied with 18 U. S. C. § 985(c) as to real property, or 60 days after process was executed on the property under Rule G(3).

(iii) A claim filed by a person asserting an interest as a bailee must identify the bailor, and if filed on the bailor's behalf must state the authority to do so.

(*b*) *Answer.*—A claimant must serve and file an answer to the complaint or a motion under Rule 12 within 20 days after filing the claim. A claimant waives an objection to in rem jurisdiction or to venue if the objection is not made by motion or stated in the answer.

(*6*) *Special interrogatories.*

(*a*) *Time and scope.*—The government may serve special interrogatories limited to the claimant's identity and relationship to the defendant property without the court's leave at any time after the claim is filed and before discovery is closed. But if the claimant serves a motion to dismiss the action, the government must serve the interrogatories within 20 days after the motion is served.

(*b*) *Answers or objections.*—Answers or objections to these interrogatories must be served within 20 days after the interrogatories are served.

(*c*) *Government's response deferred.*—The government need not respond to a claimant's motion to dismiss the action under Rule G(8)(b) until 20 days after the claimant has answered these interrogatories.

(*7*) *Preserving, preventing criminal use, and disposing of property; sales.*

(*a*) *Preserving and preventing criminal use of property.*—When the government does not have actual possession of the defendant property the court, on motion or on its own, may enter any order necessary to preserve the property, to prevent its removal or encumbrance, or to prevent its use in a criminal offense.

(*b*) *Interlocutory sale or delivery.*

(*i*) *Order to sell.*—On motion by a party or a person having custody of the property, the court may order all or part of the property sold if:

(A) the property is perishable or at risk of deterioration, decay, or injury by being detained in custody pending the action;

(B) the expense of keeping the property is excessive or is disproportionate to its fair market value;

(C) the property is subject to a mortgage or to taxes on which the owner is in default; or

(D) the court finds other good cause.

(*ii*) *Who makes the sale.*—A sale must be made by a United States agency that has authority to sell the property, by the agency's contractor, or by any person the court designates.

(*iii*) *Sale procedures.*—The sale is governed by 28 U. S. C. §§ 2001, 2002, and 2004, unless all parties, with the court's approval, agree to the sale, aspects of the sale, or different procedures.

(*iv*) *Sale proceeds.*—Sale proceeds are a substitute res subject to forfeiture in place of the property that was sold. The proceeds must be held in an interest-bearing account maintained by the United States pending the conclusion of the forfeiture action.

(*v*) *Delivery on a claimant's motion.*—The court may order that the property be delivered to the claimant pending the conclusion of the action if the claimant shows circumstances that would permit sale under Rule G(7)(b)(i) and gives security under these rules.

(*c*) *Disposing of forfeited property.*—Upon entry of a forfeiture judgment, the property or proceeds from selling the property must be disposed of as provided by law.

(*8*) *Motions.*

(*a*) *Motion to suppress use of the property as evidence.*—If the defendant property was seized, a party with standing to contest the lawfulness of the seizure may move to suppress use of the property as evidence.

Suppression does not affect forfeiture of the property based on independently derived evidence.

(*b*) *Motion to dismiss the action.*

(i) A claimant who establishes standing to contest forfeiture may move to dismiss the action under Rule 12(b).

(ii) In an action governed by 18 U. S. C. § 983(a)(3)(D) the complaint may not be dismissed on the ground that the government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property. The sufficiency of the complaint is governed by Rule G(2).

(*c*) *Motion to strike a claim or answer.*

(i) At any time before trial, the government may move to strike a claim or answer:

(A) for failing to comply with Rule G(5) or (6), or

(B) because the claimant lacks standing.

(ii) The motion:

(A) must be decided before any motion by the claimant to dismiss the action; and

(B) may be presented as a motion for judgment on the pleadings or as a motion to determine after a hearing or by summary judgment whether the claimant can carry the burden of establishing standing by a preponderance of the evidence.

(*d*) *Petition to release property.*

(i) If a United States agency or an agency's contractor holds property for judicial or nonjudicial forfeiture under a statute governed by 18 U. S. C. § 983(f), a person who has filed a claim to the property may petition for its release under § 983(f).

(ii) If a petition for release is filed before a judicial forfeiture action is filed against the property, the petition may be filed either in the district where the property was seized or in the district where a warrant to seize the property issued. If a judicial forfeiture action against the property is later filed in another district—or if the government shows that the action will be filed in another district—the petition may be transferred to that district under 28 U. S. C. § 1404.

(*e*) *Excessive fines.*—A claimant may seek to mitigate a forfeiture under the Excessive Fines Clause of the Eighth Amendment by motion for summary judgment or by motion made after entry of a forfeiture judgment if:

(i) the claimant has pleaded the defense under Rule 8; and

(ii) the parties have had the opportunity to conduct civil discovery on the defense.

(*9*) *Trial.*—Trial is to the court unless any party demands trial by jury under Rule 38.

# AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 12, 2006, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1270. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure, and amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, 500 U. S. 991, 507 U. S. 1161, 511 U. S. 1175, 514 U. S. 1159, 517 U. S. 1285, 520 U. S. 1313, 523 U. S. 1227, 526 U. S. 1189, 529 U. S. 1179, 535 U. S. 1157, 541 U. S. 1103, and 544 U. S. 1181.

# LETTER OF TRANSMITTAL

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SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 12, 2006

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
*Chief Justice of the United States*

# SUPREME COURT OF THE UNITED STATES

APRIL 12, 2006

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 5, 6, 32.1, 40, 41, and 58.

[See *infra*, pp. 1273–1280.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2006, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

## AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

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*Rule 5. Initial appearance.*

* * * * *

(*c*) *Place of initial appearance; transfer to another district.*

* * * * *

(*3*) *Procedures in a district other than where the offense was allegedly committed.*—If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

* * * * *

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1;

(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:

(i) the government produces the warrant, a certified copy of the warrant, or a reliable electronic form of either; and

* * * * *

*Rule 6. The grand jury.*

* * * * *

(*e*) *Recording and disclosing the proceedings.*

* * * * *

(*3*) *Exceptions.*

* * * * *

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U. S. C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.

. . . . .

(7) *Contempt.*—A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence under Rule 6, may be punished as a contempt of court.

. . . . .

*Rule 32.1. Revoking or modifying probation or supervised release.*

(*a*) *Initial appearance.*

. . . . .

(5) *Appearance in a district lacking jurisdiction.*—If the person is arrested or appears in a district that does

not have jurisdiction to conduct a revocation hearing, the magistrate judge must:

. . . . .

(B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if:

(i) the government produces certified copies of the judgment, warrant, and warrant application, or produces copies of those certified documents by reliable electronic means; and

(ii) the judge finds that the person is the same person named in the warrant.

. . . . .

*Rule 40. Arrest for failing to appear in another district or for violating conditions of release set in another district.*

(*a*) *In general.*—A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for:

(i) failing to appear as required by the terms of that person's release under 18 U. S. C. §§ 3141–3156 or by a subpoena; or

(ii) violating conditions of release set in another district.

. . . . .

*Rule 41. Search and seizure.*

(*a*) *Scope and definitions.*

. . . . .

(*2*) *Definitions.*—The following definitions apply under this rule:

. . . . .

(D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U. S. C. § 2331.

(E) "Tracking device" has the meaning set out in 18 U. S. C. § 3117(b).

(*b*) *Authority to issue a warrant.*—At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed;

(3) a magistrate judge—in an investigation of domestic terrorism or international terrorism—with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district; and

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both.

. . . . .

(*d*) *Obtaining a warrant.*

(*1*) *In general.*—After receiving an affidavit or other information, a magistrate judge—or if authorized by Rule 41(b), a judge of a state court of record—must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device.

. . . . .

(*3*) *Requesting a warrant by telephonic or other means.*

(*A*) *In general.*—A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.

(*B*) *Recording testimony.*—Upon learning that an applicant is requesting a warrant under Rule 41(d)(3)(A), a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

* * * * *

(*e*) *Issuing the warrant.*

(*1*) *In general.*—The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(*2*) *Contents of the warrant.*

(*A*) *Warrant to search for and seize a person or property.*—Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than 10 days;

(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

(iii) return the warrant to the magistrate judge designated in the warrant.

(*B*) *Warrant for a tracking device.*—A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and

(iii) return the warrant to the judge designated in the warrant.

(*3*) *Warrant by telephonic or other means.*—If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(*A*) *Preparing a proposed duplicate original warrant.*—The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(*B*) *Preparing an original warrant.*—If the applicant reads the contents of the proposed duplicate original warrant, the magistrate judge must enter those contents into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant.

(*C*) *Modification.*—The magistrate judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the applicant to modify the proposed duplicate original warrant accordingly.

(*D*) *Signing the warrant.*—Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact date and time it is issued, and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant.

(*f*) *Executing and returning the warrant.*

(*1*) *Warrant to search for and seize a person or property.*

(*A*) *Noting the time.*—The officer executing the warrant must enter on it the exact date and time it was executed.

(*B*) *Inventory.*—An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.

(*C*) *Receipt.*—The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property.

(*D*) *Return.*—The officer executing the warrant must promptly return it—together with a copy of the inventory—to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(*2*) *Warrant for a tracking device.*

(*A*) *Noting the time.*—The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.

(*B*) *Return.*—Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant.

(*C*) *Service.*—Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking-device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3).

(*3*) *Delayed notice.*—Upon the government's request, a magistrate judge—or if authorized by Rule 41(b), a judge of a state court of record—may delay any notice required by this rule if the delay is authorized by statute.

* * * * *

*Rule 58. Petty offenses and other misdemeanors.*

* * * * *

(*b*) *Pretrial procedure.*

* * * * *

(*2*) *Initial appearance.*—At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

* * * * *

(G) any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release.

* * * * *

# AMENDMENTS TO FEDERAL RULES OF EVIDENCE

The following amendments to the Federal Rules of Evidence were prescribed by the Supreme Court of the United States on April 12, 2006, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1282. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier reference to the Federal Rules of Evidence, see 409 U. S. 1132. For earlier publication of the Federal Rules of Evidence, and amendments thereto, see 441 U. S. 1005, 480 U. S. 1023, 485 U. S. 1049, 493 U. S. 1173, 500 U. S. 1001, 507 U. S. 1187, 511 U. S. 1187, 520 U. S. 1323, 523 U. S. 1235, 529 U. S. 1189, and 538 U. S. 1097.

# LETTER OF TRANSMITTAL

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SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 12, 2006

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

I have the honor to submit to the Congress the amendments to the Federal Rules of Evidence that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
*Chief Justice of the United States*

## SUPREME COURT OF THE UNITED STATES

APRIL 12, 2006

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein the amendments to Evidence Rules 404, 408, 606, and 609.

[See *infra*, pp. 1285–1288.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2006, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

# AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

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*Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.*

(*a*) *Character evidence generally.*—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(*1*) *Character of accused.*—In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(*2*) *Character of alleged victim.*—In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(*3*) *Character of witness.*—Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

. . . . .

*Rule 408. Compromise and offers to compromise.*

(*a*) *Prohibited uses.*—Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(*b*) *Permitted uses.*—This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

*Rule 606. Competency of juror as witness.*

. . . . .

(*b*) *Inquiry into validity of verdict or indictment.*—Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

*Rule 609. Impeachment by evidence of conviction of crime.*

(*a*) *General rule.*—For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(*b*) *Time limit.*—Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(*c*) *Effect of pardon, annulment, or certificate of rehabilitation.*—Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(*d*) *Juvenile adjudications.*—Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(*e*) *Pendency of appeal.*—The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

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**CONSTITUTIONAL LAW.**

**I. Confrontation of Witnesses.**

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**CONSTITUTIONAL LAW**—Continued.
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**II. Due Process.**

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2. *Tax sale—Unclaimed notice.*—When mailed notice of a tax sale is returned unclaimed, a State must take additional reasonable steps to attempt to provide notice to property owner before selling his property, if it is practicable to do so; because additional steps were available here, State's effort to provide notice to petitioner did not satisfy due process. Jones v. Flowers, p. 220.

**III. Freedoms of Speech and Association.**

1. *Federal funding—Solomon Amendment—Military recruiters on college campuses.*—Because Congress could require law schools to provide equal access to military recruiters without violating schools' freedoms of speech and association, Third Circuit erred in holding that Solomon Amendment—which denies federal funds to educational institutions that fail to give military recruiters access equal to that provided other recruiters—likely violates First Amendment. Rumsfeld v. Forum for Academic and Institutional Rights, Inc., p. 47.

2. *Public employees—Statements pursuant official duties.*—When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and Constitution does not insulate their communications from employer discipline. Garcetti v. Ceballos, p. 410.

**IV. Right to Fair Trial.**

*State evidence rule—Proof of third-party guilt.*—A criminal defendant's federal constitutional rights are violated by an evidence rule preventing a defendant from introducing proof of third-party guilt if prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict. Holmes v. South Carolina, p. 319.

**V. Searches and Seizures.**

1. *Knock-and-announce violation—Suppression of evidence.*—Violation of knock-and-announce rule does not require suppression of evidence found in a search. Hudson v. Michigan, p. 586.

**CONSTITUTIONAL LAW**—Continued.

2. *Parolees—Suspicionless searches.*—Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee. Samson v. California, p. 843.

3. *Warrantless entry—Reasonableness.*—Police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with injury. Brigham City v. Stuart, p. 398.

4. *Warrantless entry and search—Co-occupant's refusal to permit entry.*—In circumstances at issue, a physically present co-occupant's stated refusal to permit entry to a home renders warrantless entry and search unreasonable under Fourth Amendment and invalid as to him. Georgia v. Randolph, p. 103.

5. *Warrants—Probable cause.*—"Anticipatory" search warrants based on an affidavit showing probable cause that at some future time (but not presently) certain evidence of a crime will be located at a specified place are not categorically unconstitutional under Fourth Amendment's probable-cause provision; anticipatory warrant at issue did not violate Amendment's particularity requirement, which does not include conditions precedent to execution of such a warrant. United States v. Grubbs, p. 90.

**VI. States' Immunity from Suit.**

*Admiralty—"Arm of the State."*—A governmental entity that does not qualify as an "arm of the State" for Eleventh Amendment purposes cannot assert sovereign immunity as a defense to an admiralty suit. Northern Ins. Co. of N. Y. v. Chatham County, p. 189.

**CONTROLLED SUBSTANCES.** See **Criminal Law**, 1.

**CO-OCCUPANTS' RIGHTS.** See **Constitutional Law**, V, 4.

**CREDITOR AND DEBTOR.** See **Bankruptcy.**

**CRIMINAL LAW.** See also **Civil Rights Act of 1871; Constitutional Law**, I; II, 1; V.

1. *Federal Sentencing Guidelines—Prior convictions.*—Fifth Circuit erred in treating petitioner's prior conviction for simple possession of a controlled substance as a "controlled substance offense" for purposes of Guidelines. Salinas v. United States, p. 188.

2. *Speedy Trial Act of 1974—Waiver—Estoppel—Standard of review.*—A defendant may not prospectively waive application of Act, which generally requires criminal trials to start within 70 days of indictment; petitioner is not estopped from challenging exclusion of a 91-day delay from 70-day period; District Court's decision to exclude that delay is not subject to harmless-error review; Act was violated because 91-day delay exceeded 70 days permitted by Act. Zedner v. United States, p. 489.

**CROSS-EXAMINATION OF WITNESSES.** See **Constitutional Law,** I.

**CRUEL AND UNUSUAL PUNISHMENT.** See **Civil Rights Act of 1871.**

**DAMS.** See **Clean Water Act,** 1.

**DEATH SENTENCE.** See **Civil Rights Act of 1871.**

**DEBTOR AND CREDITOR.** See **Bankruptcy.**

**DELAY IN START OF CRIMINAL TRIAL.** See **Criminal Law,** 2.

**DELINQUENT TAXES.** See **Constitutional Law,** II, 2.

**DOMESTIC VIOLENCE.** See **Constitutional Law,** I.

**DRUG TESTS.** See **Federal Employer and Employees.**

**DUE PROCESS.** See **Constitutional Law,** II.

**EDUCATIONAL INSTITUTIONS.** See **Constitutional Law,** III, 1.

**EIGHTH AMENDMENT.** See **Civil Rights Act of 1871.**

**ELEVENTH AMENDMENT.** See **Constitutional Law,** VI.

**EMPLOYEE BENEFIT PLANS.** See **Bankruptcy; Employee Retirement Income Security Act of 1974.**

**EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.**

*"Equitable relief"—Medical expense reimbursement.*—Action filed by respondent, a fiduciary under ERISA, for reimbursement of medical expenses that petitioner beneficiaries had recovered for their injuries from a third party properly sought "equitable relief" under ERISA § 502(a)(3). Sereboff v. Mid Atlantic Medical Services, Inc., p. 356.

**EMPLOYER AND EMPLOYEES.** See **Bankruptcy; Constitutional Law,** III, 2; **Federal Employer and Employees.**

**ENHANCED SENTENCES.** See **Criminal Law,** 1.

**ENTRY AND SEARCH OF HOME.** See **Constitutional Law,** V, 1, 3, 4.

**EQUITABLE RELIEF.** See **Employee Retirement Income Security Act of 1974; Injunctions.**

**ESTOPPEL.** See **Criminal Law,** 2.

**EVIDENCE SUPPRESSION.** See **Constitutional Law,** II, 1; V.

**EXTORTION.** See **Hobbs Act.**

**FEAR OF PERSECUTION.** See **Immigration and Nationality Act.**

**FEDERAL EMPLOYEES HEALTH BENEFITS ACT OF 1959.** See **Jurisdiction,** 3.

**FEDERAL EMPLOYER AND EMPLOYEES.**

*Drug and alcohol tests—Preclusion.*—Case is remanded for Ninth Circuit to address whether Federal Aviation Administration's actions against an employee—who claimed that his constitutional rights were violated by a nonrandom drug and alcohol test—constitute a "prohibited personnel practice," see 5 U. S. C. §2302(b); 49 U. S. C. §40122(g)(2)(A), as well as other issues raised in this Court but not decided below, resolution of which may obviate need to decide ultimate issue whether 5 U. S. C. §7121 precludes employees from pursuing a remedy beyond those set out in Civil Service Reform Act of 1978. Whitman v. Department of Transportation, p. 512.

**FEDERAL FUNDING FOR EDUCATIONAL INSTITUTIONS.** See **Constitutional Law,** III, 1.

**FEDERAL RULES OF APPELLATE PROCEDURE.**

Amendments to Rules, p. 1221.

**FEDERAL RULES OF BANKRUPTCY PROCEDURE.**

Amendments to Rules, p. 1227.

**FEDERAL RULES OF CIVIL PROCEDURE.**

Amendments to Rules, p. 1233.

**FEDERAL RULES OF CRIMINAL PROCEDURE.**

Amendments to Rules, p. 1269.

**FEDERAL RULES OF EVIDENCE.**

Amendments to Rules, p. 1281.

**FEDERAL SENTENCING GUIDELINES.** See **Criminal Law,** 1.

**FEDERAL-STATE RELATIONS.** See **Clean Water Act,** 1; **Constitutional Law,** VI; **Jurisdiction,** 1; **Securities Law; Social Security.**

**FIDUCIARY RESPONSIBILITIES.** See **Employee Retirement Income Security Act of 1974.**

**FIRST AMENDMENT.** See **Constitutional Law,** III.

**FLORIDA.** See **Civil Rights Act of 1871.**

**FOURTEENTH AMENDMENT.** See **Constitutional Law,** II; IV.

**FOURTH AMENDMENT.** See **Constitutional Law,** V.

**FRANCHISE TAX CREDIT.** See **Taxes.**

**FREEDOM OF ASSOCIATION.** See **Constitutional Law,** III, 1.

**FREEDOM OF SPEECH.** See **Constitutional Law,** III.

**HABEAS CORPUS.** See also **Civil Rights Act of 1871.**

1. *Antiterrorism and Effective Death Penalty Act of 1996—Erroneous time computation.*—In circumstances at issue, District Court had discretion to correct State's erroneous time computation and, accordingly, to dismiss Day's federal habeas petition as untimely under AEDPA's 1-year limitation period. Day v. McDonough, p. 198.

2. *State procedural default rule—Actual-innocence exception.*—Because House has made stringent showing required by actual-innocence exception to state procedural default rule, his federal habeas corpus action may proceed. House v. Bell, p. 518.

**HARMLESS-ERROR REVIEW.** See **Criminal Law,** 2.

**HEALTH-CARE BENEFITS.** See **Jurisdiction,** 3.

**HOBBS ACT.**

*Physical violence—Relationship to robbery or extortion.*—Congress intended only to forbid acts or threats of physical violence in furtherance of a plan to engage in robbery or extortion (and related attempts or conspiracies) when it prohibited "obstruct[ing], delay[ing], or affect[ing] commerce . . . by . . . robbery or extortion . . . or commit[ting] or threaten[ing] physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section," 18 U. S. C. § 1951(a), not to create a freestanding physical violence offense unrelated to robbery or extortion. Scheidler v. National Organization for Women, Inc., p. 9.

**HYDROELECTRIC DAMS.** See **Clean Water Act,** 1.

**IMMIGRATION AND NATIONALITY ACT.**

*Asylum claim—Fear of persecution—"Particular social group."*—In this asylum claim based on fear of persecution, Ninth Circuit erred in finding in first instance, rather than remanding to appropriate administrative agency, question whether family members constitute a "particular social group" within Act's meaning. Gonzales v. Thomas, p. 183.

**IMMUNITY FROM SUIT.** See **Constitutional Law,** VI.

**INJUNCTIONS.**

*Award of permanent relief—Four-factor test—Patent Act dispute.*—Traditional four-factor test applied by courts of equity when considering whether to award permanent injunctive relief to a prevailing plaintiff applies to disputes arising under Patent Act. eBay Inc. v. MercExchange, L. L. C., p. 388.

**JOINT VENTURES.** See **Antitrust Acts.**

**JURISDICTION.**

1. *Bankruptcy proceeding—Probate exception.*—Ninth Circuit had no warrant from Congress or this Court for its sweeping extension of "probate exception" to federal-court jurisdiction; because this case does not fall within exception's scope, District Court properly asserted jurisdiction over petitioner's tort counterclaim against respondent, despite ongoing proceedings in a Texas Probate Court. Marshall v. Marshall, p. 293.

2. *Court of Appeals—Securities Litigation Uniform Standards Act of 1998—Removal—Remand to state court.*—Federal district-court orders remanding removed securities class actions to state court for want of preclusion under Act are subject to 28 U. S. C. § 1447(d), which makes remand orders unreviewable on appeal. Kircher v. Putnam Funds Trust, p. 633.

3. *Health-care plan provider's suit—Reimbursement of benefits paid.*—Title 28 U. S. C. § 1331—which authorizes federal jurisdiction over "civil actions arising under the . . . laws . . . of the United States"—does not encompass a federal suit by a health-care plan providing benefits under Federal Employees Health Benefits Act of 1959 for reimbursement of medical bills plan paid on behalf of a plan beneficiary who, injured in an accident, recovered damages (unaided by plan administrator) in a state-court tort action against a third party alleged to have caused accident. Empire HealthChoice Assurance, Inc. v. McVeigh, p. 677.

**KNOCK-AND-ANNOUNCE RULE.** See **Constitutional Law,** V, 1.

**LAW SCHOOLS.** See **Constitutional Law,** III, 1.

**LETHAL INJECTION.** See **Civil Rights Act of 1871.**

**LIMITATIONS PERIODS.** See **Habeas Corpus,** 1.

**MARKET POWER.** See **Patents.**

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**MEDICAL BENEFITS.** See **Employee Retirement Income Security Act of 1974; Jurisdiction,** 3.

**MILITARY RECRUITERS.** See **Constitutional Law,** III, 1.

**NAVIGABLE WATERS.** See **Clean Water Act.**

**NONTESTIMONIAL STATEMENTS TO POLICE.** See **Constitutional Law,** I.

**NOTICE OF TAX SALE.** See **Constitutional Law,** II, 2.

**PAROLEE SEARCHES.** See **Constitutional Law,** V, 2.

**PATENTS.** See also **Injunctions.**

*Market power—Tying arrangements.*—Because a patent does not necessarily confer market power upon patentee, in cases involving a tying arrangement, a plaintiff must prove that defendant has market power in tying product. Illinois Tool Works Inc. v. Independent Ink, Inc., p. 28.

**PERMANENT INJUNCTIVE RELIEF.** See **Injunctions.**

**PERSECUTION FEARS.** See **Immigration and Nationality Act.**

**PER SE ILLEGALITY.** See **Antitrust Acts.**

**PHYSICAL VIOLENCE.** See **Hobbs Act.**

**POLICE STATEMENTS.** See **Constitutional Law,** I.

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**PRE-EMPTION.** See **Securities Law.**

**PRICE SETTING.** See **Antitrust Acts.**

**PRIOR CONVICTIONS.** See **Criminal Law,** 1.

**PROBABLE CAUSE.** See ***Bivens*** **Actions; Constitutional Law,** V, 5.

**PROBATE EXCEPTION.** See **Jurisdiction,** 1.

**PROCEDURAL DEFAULT.** See **Habeas Corpus,** 2.

**PROPERTY SALE.** See **Constitutional Law,** II, 2.

**PROXIMATE CAUSE.** See **Racketeer Influenced and Corrupt Organizations Act.**

**PUBLIC EMPLOYER AND PUBLIC EMPLOYEES.** See **Constitutional Law,** III, 2; **Federal Employers and Employees.**

**RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT.**

*Proximate cause requirement.*—Respondent cannot maintain a RICO claim against petitioners under 18 U. S. C. § 1962(c)—which forbids conducting or participating in conduct of an enterprise's affairs through a pattern of racketeering activity—because it has not shown proximate cause between injury asserted and injurious conduct alleged, petitioner's failure to pay state sales taxes; Second Circuit must on remand determine whether proximate cause requirement is met with respect to respondent's claim under § 1962(a), which makes it unlawful to "use or invest" income derived from a pattern of racketeering activity. Anza v. Ideal Steel Supply Corp., p. 451.

**REMOVAL.** See **Jurisdiction,** 2.

**RETALIATORY PROSECUTION.** See ***Bivens* Actions.**

**RIGHT TO CROSS-EXAMINATION.** See **Constitutional Law,** I.

**RIVERS AND DAMS.** See **Clean Water Act,** 1.

**ROBBERY.** See **Hobbs Act.**

**SALES TAXES.** See **Racketeer Influenced and Corrupt Organizations Act.**

**SEARCHES AND SEIZURES.** See **Constitutional Law,** V.

**SECTION 1983.** See **Civil Rights Act of 1871.**

**SECURITIES LAW.**

*Securities Litigation Uniform Standards Act of 1988—Pre-emption of state-law fraud claims.*—Background, text, and purpose of Act's pre-emption provision demonstrate that Act pre-empts state-law holder class-action securities fraud claims of kind alleged here. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, p. 71.

**SECURITIES LITIGATION UNIFORM STANDARDS ACT OF 1988.** See **Jurisdiction,** 2; **Securities Law.**

**SENTENCING GUIDELINES.** See **Criminal Law,** 1.

**SHERMAN ACT.** See **Antitrust Acts.**

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**SOCIAL SECURITY.**

*Medicaid—State's lien on tort settlement.*—Federal Medicaid law does not authorize Arkansas to assert a lien on Ahlborn's tort settlement in an amount exceeding that portion of settlement that represented Medicaid payments for Ahlborn's medical care, and federal anti-lien provision affirmatively prohibits State from doing so. Arkansas Dept. of Health and Human Servs. v. Ahlborn, p. 268.

**SOLOMON AMENDMENT.** See **Constitutional Law,** III, 1.

**SOUTH CAROLINA.** See **Constitutional Law,** IV.

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**SUPREME COURT.**

1. Proceedings in memory of Chief Justice Rehnquist, p. IX.
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**SUSPICIONLESS SEARCHES.** See **Constitutional Law,** V, 2.

**TAXES.** See also **Racketeer Influenced and Corrupt Organizations Act.**

*Franchise tax credit—Standing.*—Plaintiff taxpayers have not established standing to challenge a state franchise tax credit; because they lack standing, lower courts erred in considering their claims on merits. DaimlerChrysler Corp. v. Cuno, p. 332.

**TAX SALE.** See **Constitutional Law,** II, 2.

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**UNCLAIMED TAX SALE NOTICE.** See **Constitutional Law,** II, 2.

**UNITED STATES SENTENCING GUIDELINES.** See **Criminal Law,** 1.

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**UNSECURED CREDITORS' CLAIMS.** See **Bankruptcy.**

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**WORDS AND PHRASES.**

1. *"An employee benefit plan."* Bankruptcy Code, 11 U. S. C. § 507(a)(5). Howard Delivery Service, Inc. v. Zurich American Ins. Co., p. 651.

2. *"Civil actions arising under the . . . laws . . . of the United States."* 28 U. S. C. § 1331. Empire HealthChoice Assurance, Inc. v. McVeigh, p. 677.

3. *"Discharge into the navigable water[s]."* § 401, Clean Water Act, 33 U. S. C. § 1341. S. D. Warren Co. v. Maine Bd. of Environmental Protection, p. 370.

4. *"Equitable relief."* § 502(a)(3), Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1132(a)(3). Sereboff v. Mid Atlantic Medical Services, Inc., p. 356.

5. *"Obstruct[ing], delay[ing], or affect[ing] commerce . . . by . . . robbery or extortion . . . or commit[ting] or threaten[ing] physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section."* Hobbs Act, 18 U. S. C. § 1951(a). Scheidler v. National Organization for Women, Inc., p. 9.

6. *"Particular social group."* § 101(a)(42)(A), Immigration and Nationality Act, 8 U. S. C. § 1101(a)(42)(A). Gonzales v. Thomas, p. 183.

**WORKERS' COMPENSATION PREMIUMS.** See **Bankruptcy.**